In the Supreme Court of the United States.

OCTOBER TERM, 1902.

THE UNITED STATES, APPELLANT,
v.
GEORGE DEWEY, ADMIRAL U. S. NAVY, ETC. } No. 309.

GEORGE DEWEY, ADMIRAL U. S. NAVY, appellant,
v.
THE "DON JUAN DE AUSTRIA" ET AL. } No. 310.

EDWIN F. STOVELL, ON BEHALF OF HIMSELF and officers and crew of the U. S. S. "Nanshan," appellant,
v.
GEORGE DEWEY, ADMIRAL U. S. NAVY, ETC. } No. 311.

APPEALS FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

BRIEF FOR THE UNITED STATES.

INDEX.

	Page.
Statement of the case	2
Assignments of error	7
Argument	8
General principles	9
Questions raised by the appeal of the United States:	
1. Status of vessels sunk or destroyed in action and afterwards raised and reconstructed	25
Recent decisions under section 4635	49
The course pursued by the libellant in regard to these vessels	54

8147—02——1

Argument—Continued. Page.
Questions raised by the appeal of the United States—Cont'd.
1. Status of vessels sunks or destroyed, etc.—Continued.
The understanding of the Navy Department 62
The condition of the vessels and the work done upon them 64
Discussion of the construction adopted by the court below 71
2. Status of property taken from vessels sunk or otherwise destroyed 85
Questions raised by the cross appeal of Admiral Dewey:
1. Status of property taken on land 107
The property restored to Spain 142
2. Status of cascos and other small craft 152
Relative force of the libellant's fleet and of the enemy 164

STATEMENT OF THE CASE.

These appeals were taken from a decree of the supreme court of the District of Columbia, sitting as a district court of the United States, in admiralty, in a suit in prize brought by George Dewey, Admiral, U. S. Navy, in behalf of himself and the officers and crew of the naval force on the Asiatic Station, taking part in the battle of Manila Bay.

On May 1, 1898, the libellant, being then a commodore in the United States Navy, with the fleet under his command, engaged a Spanish fleet consisting of the *Reina Cristina*, *Castilla*, *Don Juan de Austria*, *Don Antonio de Ulloa*, *General Lezo*, *Marques del Duero*, *Argos*, *Velasco*, *Isla de Mindanao*, *Isla de Cuba*, *Isla de Luzon*, *Manila*, and two torpedo boats. At the close of the battle the *Manila* alone remained afloat. She was captured, as were also some smaller vessels, both

public and private, a few of which were captured at that time and others subsequently. (Appx.,[a] 126–130.)

In a number of official reports, written at various dates after the battle, the libellant referred to the *Don Juan de Austria*, *Isla de Cuba*, and *Isla de Luzon* as "destroyed" or "burnt." (Appx., 68, 69, 71, 81, 127.) All the captured vessels which remained afloat were appraised (Rec., 122–123), and they were also appropriated to the use of the United States, except one or more private vessels, which were restored to their owners. On May 3, 1898, the libellant took possession of the Cavite Arsenal, containing a large quantity of naval stores and supplies and some boats. About the same time he also took possession of certain land batteries. (Appx., 127.) Some of the property taken at the arsenal, besides that taken from the sunken vessels, was included in the appraisement above mentioned. (Rec., 113–125.)

The protocol between the United States and Spain, signed August 12, 1898, provided as follows:

> The United States will occupy and hold the city, bay, and harbor of Manila pending the conclusion of a treaty of peace, which shall determine the control, disposition, and government of the Philippines. * * * Upon the conclusion and signing of this protocol hostilities between the two countries shall be suspended.

In September, 1898, the Navy Department contracted with the Hongkong and Whampoa Dock Company to raise and reconstruct the *Don Juan de Austria*, *Isla de*

[a] For brevity the Appendix to the Report of the Chief of the Bureau of Navigation for 1898, which is by agreement a part of the record in this case, will be cited in this brief as "Appx."

Cuba, and *Isla de Luzon*, which had been sunk by the Spaniards in shallow water, by opening their sea valves, and had been afterwards set on fire by the libellant. All of them that was out of water had been so seriously injured by fire as to require complete reconstruction. The work of raising these vessels was begun on October 29, 1898, and finished on November 24. They were then overhauled sufficiently to enable them to proceed to Hongkong (the two *Islas* arriving in a semi-sinking condition), where they were reconstructed and refitted for use in the United States Navy, being completed toward the close of 1899. (Rec., 131–142; Appx., 81.)

At least two of the other sunken vessels, the *Ulloa* and the *Velasco*, could probably have been raised to advantage, as they were not burned, but no attempt was ever made to raise any of them, though a small amount of property was taken from them for Government use. They were all advertised for sale in September, 1898, but no bids were received, owing to the unsettled political conditions. (Rec., 62, 142.) Subsequently, in a suit brought by this libellant in the Court of Claims, it was adjudged that they were all "sunk or otherwise destroyed," within the meaning of section 4635 (Rev. Stats.), and bounty was awarded accordingly. (*Dewey* v. *United States*, 178 U. S., 510.)

Shortly after the battle the libellant took possession, for Government use, of certain nonseagoing craft, viz, some native cascos or cargo boats and two floating derricks belonging to private parties (Rec., 23–24, 69.)

The treaty of peace between the United States and Spain provided that "stands of arms, uncaptured war vessels, small arms, guns of all calibers, with their carriages and accessories, powder, ammunition, live stock, and materials and supplies of all kinds belonging to the land and naval forces of Spain in the Philippines and Guam, remain the property of Spain." Under this agreement so much of the public property captured at the Cavite Arsenal, and elsewhere on land, remaining unused at the date of the exchange of ratifications (April 11, 1899), was subsequently restored to Spain.

On July 20, 1899, this libel was filed against the *Don Juan de Austria*, *Isla de Cuba*, *Isla de Luzon*, all the property taken from the sunken vessels, all the vessels and other property taken afloat, and all the property captured ashore, on the ground that it had all been appropriated to the use of the United States, and that its money value should be deposited subject to the jurisdiction of the court, and should be condemned as prize for the benefit of the libellant and his naval force. (Rec., I–V.) The libel was subsequently amended so as to cover some property not specifically covered by it. (Rec., XV, 147.) Copies of the libel were served upon the United States attorney for the District of Columbia and the Secretary of the Navy, and a rule was issued upon the latter requiring him to show cause why the value of the alleged prize property should not be deposited subject to the order of the court and why the said property should not be condemned as prize. (Rec., VI–VIII.)

On January 8, 1900, the answer of the United States was filed, admitting the fact of the capture of the property to which the libel related, but denying that the *Don Juan de Austria, Isla de Cuba, Isla de Luzon*, the property captured on board of them, and the property captured on land, were subject to condemnation as prize, and praying that due proof should be made of all the facts and circumstances of the other captures alleged to have been made as prize. (Rec., VIII–X.) This answer was subsequently amended in a few particulars. (Rec., XII, XV, 147.) On April 25, 1900, the Secretary of the Navy filed a separate answer, concurring in the answer of the United States. (Rec., XI.) On March 26, 1901, an intervening libel was filed by Edwin F. Stovell in behalf of himself and the officers and crew of the *Nanshan*, to which an answer was filed by the libellant. (Rec., XIII, 144.)

The case having been heard by the late Judge Bradley, a decree of condemnation and distribution was filed November 5, 1901, to the following effect:

The *Isla de Cuba, Isla de Luzon, Don Juan de Austria*, the *Manila*, and all other captured vessels named in the appraisement, except such as may have been restored to private owners, and all property captured upon or belonging to any of the said vessels, or any other vessels which were sunk or otherwise destroyed on May 1, 1898, were held to be lawful prize of war.

All property captured ashore and all nonseagoing craft belonging to the arsenal, as well as all cascos and floating derricks not belonging to the King of Spain,

were held not to be prize, and as to such property the libel was dismissed.

The *Nanshan* and *Zafiro* were held not entitled to share in any of the prize property, and the prize was held to have been of inferior force to the vessels making the capture.

It was ordered that upon the ascertainment of the value of the property condemned as prize the Secretary of the Navy should deposit an amount equal thereto with the Treasurer of the United States, subject to the further orders of the court. (Rec., 159–161.)

An appeal was then taken by the United States, a cross appeal by the libellant, and another appeal by the intervenor. (Rec., 161–163.)

ASSIGNMENTS OF ERROR.

The supreme court of the District of Columbia erred:

1. In holding that the Spanish vessels of war, *Don Juan de Austria*, *Isla de Cuba*, and *Isla de Luzon*, together with whatever guns, munitions of war, equipment, stores, and other articles may have been found upon them, were captured by a fleet of the United States, under the command of the libellant, under such circumstances that the said vessels and other property should be condemned and forfeited to the United States as lawful prize of war, for the benefit of the captors.

2. In holding that certain guns, munitions of war, equipment, stores, and other articles on board of Spanish vessels of war which were sunk or otherwise

destroyed by a fleet of the United States, under the command of the libellant, were captured by the said fleet under such circumstances that the said property should be condemned and forfeited to the United States as lawful prize of war, for the benefit of the captors.

3. In holding that the libellant and the officers and enlisted men of the United States Navy who took part in the naval engagement in Manila Bay, and in behalf of whom he brought this suit, are entitled to receive a moiety of the amount of the value of the said *Don Juan de Austria*, *Isla de Cuba*, and *Isla de Luzon*, and of the said guns, munitions of war, equipment, stores, and other articles which were upon the said vessels and upon Spanish vessels of war which were sunk or otherwise destroyed.

BRIEF OF ARGUMENT.

It is conceded on the part of the United States that some of the property concerning which the libel in the present case has been filed was captured under such circumstances as to entitle the libellant to proceed in a district court of the United States for the condemnation of such property as prize. It is further conceded that such property having been appropriated to the use of the United States, the libellant was entitled to file his libel in the court below, and is entitled to a judgment for one-half of the reasonable value of such property at the time that it was appropriated, the amount of the judgment to be distributed as prize money to him and the officers and men of the naval force under his command. The property so conceded to have been taken

as prize includes the Spanish seagoing vessels, both public and private, with the property found on board of them and the equipment belonging to them, which were captured at the battle of Manila Bay or soon afterwards in the course of active naval warfare, and have not been restored to their owners.

In addition to this property the libel related to two other classes of property which the court below has held should be condemned as prize for the libellant's benefit, viz, vessels of war sunk or otherwise destroyed, but raised and reconstructed for the United States Navy, by a foreign corporation, after hostilities ceased, and property recovered from such vessels of war and from others which were not raised. To these two classes of property the appeal of the United States relates. There were also two other classes of property, viz, property taken on land and nonseagoing craft, as to both of which the libel was dismissed, and to these latter classes the libellant's appeal relates. The appeal of the intervenor relates only to a question of the distribution of the prize fund, as to which the United States has nothing to say.

Before proceeding to discuss in detail the questions raised by each appeal, certain general principles, bearing upon all these questions, may be considered.

GENERAL PRINCIPLES.

It is clear, in the first place, that no citizen can have any right to have any vessel or property condemned as prize for his benefit, except by authority of an act of Congress. If a vessel or other property is taken

from the enemy under such circumstances as bring the case within the true intent and meaning of the prize statutes, then the captors have a right to prize money; but if not, then such vessel or property belongs to the United States alone. The law on this subject is thus stated in *The Siren* (13 Wall., 389–392):

> Prize was wholly the creature of the Crown. No one could have any interest but what he took as the gift of the King. Beyond this he could claim nothing. The reasons upon which the rule was founded were: That right of making war and peace was exclusively in the Sovereign; that the acquisitions of war must therefore belong to him, and that their disposal might be of the utmost importance for the purposes both of war and peace. It was held that it must be presumed from these considerations that the Government did not intend to divest itself of this important attribute except in so far as such a purpose was clearly and unequivocally expressed. The right is not the private property of the Sovereign, but a trust confided to him for the public good. In private grants the construction is most strongly against the grantor. In all concessions touching capture the opposite rule prevails. A presumption arises against the grant, and it can only be rebutted by language so explicit as to leave no room for doubt upon the subject. (*The Elsebe*, 5 Rob., 155.) The lord high admiral exists now only in contemplation of law. It was deemed expedient to assign to him a certain portion of the rights of the Crown to maintain the dignity and splendor of his office. (*The Maria Francoise*, 6 Rob., 293.) Hence the doc-

trine of droits of the admiralty, and of captured property which belonged to the King *virtute coronæ*. The lord high admiral is now represented by the King, who holds the office, but in a capacity distinct from his regal character, and the droits which belonged to the office, so far as they still subsist and are not otherwise disposed of, have in the progress of time become reattached to the Crown. (*The Rebeckah*, 1 Rob., 227; *The Mercurius*, id., 81; *The Joseph*, 1 Gall., 545; 3 Reeve's Hist. of Eng. Law, 197.)

* * * * *

While the American colonies were a part of the British Empire the English maritime law, including the law of prize, was the maritime law of this country. From the close of the Revolution down to this time it has continued to be our law, so far as it is adapted to the altered circumstances and condition of the country, and has not been modified by the proper national authorities. (*Thirty Hogsheads of Sugar* v. *Boyle*, 9 Cr., 198.) In our jurisprudence there are, strictly speaking, no droits of admiralty. The United States have succeeded to the rights of the Crown. No one can have any right or interest in any prize except by their grant or permission. All captures made without their express authority inure *ipso facto* to their benefit. Whenever a claim is set up its sanction by an act of Congress must be shown. If no such act can be produced the alleged right does not exist. The United States take captured property not as droits, but strictly and solely *jure reipublicæ* (*The Joseph*, 1 Gall., 558; *The Dos Hermanos*, 10 Wheat., 310.)

It was accordingly held in that case that the capture having been made by a joint military and naval force, and there being no statute touching joint captures by the Army and Navy, the capture inured "exclusively to the benefit of the United States." This decision was in affirmance of the view held by the district court, in the statement of which Lowell, J., had said as follows:

> The English cases are very numerous in which prizes are condemned to the admiral, or, in later times, to the King in his office of lord high admiral, and not to the captors. It may well be conceded that the United States have succeeded to the rights in prize both of the Crown and of the lord high admiral, and that Congress has the right to grant prize money to whomsoever it pleases, without regard to these ancient distinctions. Still, in construing the prize acts it is useful to recollect that by the English law the grants of prize money had their well-understood limitations, and that a condemnation in prize was not necessarily a condemnation to captors; and that there were prizes which were not granted to either the admiral or the captors, such as vessels voluntarily brought in on revolt by their own crews and vessels seized in port before declaration of hostilities; so that there were three different kinds of condemnation—to the King, to the admiral, and to the captors. I have no doubt that some of the same distinctions and limitations hold good in this country to-day. (*The Siren*, 1 Low., 280, 283.)

In *The Emulous* (1 Gall., 563, 565, 569) Story, J., said:

> All property captured belongs originally to the Crown, and individuals can acquire a title thereto in no other manner than by a grant from the Crown. * * * It is now clear, as I have already stated, that all captures in war inure to the Sovereign, and can become private property only by his grant.

His decision in this case was afterwards reversed in *Brown* v. *United States* (8 Cr., 110), but on the ground that the property in question was found on land within the United States, and, being private property, could not be condemned as enemy's property without a legislative act authorizing its confiscation. Neither the decision of this court nor the opinion rendered at the time of that decision controvert in any respect Judge Story's fundamental proposition above quoted. It seems indisputable that where an enemy's vessels or other property pass from the enemy's control and come in any sense within the control of a force of the United States, the question as to whether such vessels or other property are prize of war for the benefit of the captors, or not, must depend upon the law as applied to the conditions existing when the force of the United States secures such control. The question is not merely whether such control exists, but whether it originates under the conditions which the law recognizes as giving rise to prize rights. These conditions may be of two kinds—the conditions affecting the property itself, and those affecting the force which has come into control of it—and in either event

the law must operate upon them, to determine the question of prize or no prize, at the time the control is obtained. Thus, in the case of *The Siren* (already cited), where the conditions under consideration were of the latter sort, and the vessel was held not to be a prize, the reason was that at the time that she came into the control of a force of the United States that force, though a naval force, capable, when acting alone, of taking vessels and property as prize, was acting conjointly with a force of the Army, so that the capture was regarded as a joint capture by the Army and Navy, and, as there was no statute authorizing captors to participate in the fruits of property so captured, no prize money could be obtained.

So in the case of *Mrs. Alexander's Cotton* (2 Wall., 404), where the conditions affected the property itself, it having been taken on land and not on board of any vessel, it was held that the property was lawfully captured, but "not for the benefit of captors," because the prize law excluded "property on land from the category of prize for the benefit of captors."

The bearing of these authorities upon the present case is this, that neither capture from the enemy nor appropriation to the use of the United States can give the captors any right to prize money for the property captured, unless the conditions under which the property came into the control of the captors are those which the statute (a statute which is to be strictly construed in favor of the United States and against the captors) recognizes as entitling the captors to receive

this money. Hence, unless it be held that the statute, strictly construed, makes any given class of property taken under any given circumstances a prize for the benefit of the captors, no prize money can be recovered on account of such property.

It was, however, contended in the court below, in the libellant's behalf, that the United States *could not*, under the statutes in force in 1898, acquire for itself, by any act of its naval force, any property whatever from an enemy, except subject to the adjudication of a prize court in favor of the captors. This fundamental contention was reached by a process of induction as follows: Property captured by a naval force is prize. It is so because of sections 4613 and 4630 of the Revised Statutes (sections 33 and 10 of the act of June 30 1864; 13 Stats., 315, 309), which read as follows;

> 4613. The provisions of this title shall apply to all captures made as prize by authority of the United States, or adopted and ratified by the President of the United States.
>
> 4630. The net proceeds of all property condemned as prize shall, when the prize was of superior or equal force to the vessel or vessels making the capture, be decreed to the captors; and when of inferior force, one-half shall be decreed to the United States and the other half to the captors.

The words "all captures made as prize" mean, it is said, all captures which can be "condemned as prize," i. e., all captures which are subject to adjudication and

condemnation in a court of admiralty, sitting in prize. Prior to the act of 1864 captures made by a naval force were of two kinds, viz, all property *other than* "ships and vessels, and the goods taken on board of them," such property being taken for the benefit of the United States alone; and "ships and vessels and the goods taken on board of them," the proceeds of which "shall, when of equal or superior force to the vessel or vessels making the capture, be the sole property of the captors; and when of inferior force, shall be divided equally between the United States and the officers and men making the capture." (Act of July 17, 1862, § 2, 12 Stats., 606; act of April 23, 1800, § 5, 2 Stats., 52.) *Both* kinds of captures, it is said, had to be first "adjudged good prize" by a court of admiralty before the title to the capture or to its proceeds was valid. Section 10 of the act of 1864 (R. S., § 4620) was a statute of distribution, granting to the captors the same rights which they had before under section 2 of the act of 1862, and *in addition* similarly extensive rights in all other property which before the act of 1864 would have been "condemned as prize" to the United States alone, i. e., all the property which the United States by the action of its naval force could have acquired from an enemy, whether on land or on the water. Prior to the act of 1864 the United States, by the action of its naval force, could have acquired certain kinds of property from an enemy, and could have held it for its own, but always subject to its condemnation as prize, and after the passage of that act the rights of the

United States passed to the captors, either as to the whole or as to half, under sections 10 and 33.

The fatal defect in this reasoning is the blind assumption that the United States, the fountain of all prize rights, was itself subject to the jurisdiction of its courts of admiralty as to all property which it might take by the action of its naval force from the enemy, even when it had granted no prize rights therein to the captors. It is evident that if a single instance can be found where the United States has, or has ever had, the right to take, without any adjudication, either previous or subsequent, any property captured by its naval forces, the whole fabric of the contention must collapse. As a matter of fact, there are several such instances.

Of course, if the reasoning of libellant's counsel be sound, it must have been true as to naval captures made before the act of April 23, 1800, as well as to those made after that date. Yet the act of March 2, 1799 (1 Stats., 709), provided as follows:

> SEC. 5. *And be it further enacted*, That all captured national ships or vessels of war shall be the property of the United States—all other ships or vessels, being of superior force to the vessel making the capture, in men or guns, shall be the sole property of the captors—and all ships or vessels of inferior force shall be divided equally between the United States and the officers and men of the vessel making the capture.
>
> SEC. 6. *And be it further enacted*, That the produce of prizes taken by the ships of the United

States, and bounty for taking the ships of the enemy, be proportioned and distributed in the manner following, to wit:

* * * * *

13. The bounty given by the United States on any national ship of war, taken from the enemy and brought into port, shall be for every cannon mounted, carrying a ball of twenty-four pounds or upwards, two hundred dollars; for every cannon carrying a ball of eighteen pounds, one hundred and fifty dollars; for every cannon carrying a ball of twelve pounds, one hundred dollars; and for every cannon carrying a ball of nine pounds, seventy-five dollars; for every smaller cannon, fifty dollars; and for every officer and man taken on board, forty dollars, which sums are to be divided agreeably to the foregoing articles.

Can it be contended that when a captured national ship or vessel of war was "brought into port" a court of admiralty had to intervene and condemn the vessel as good prize before it could be "the property of the United States" under this statute? As the national character of the vessel was a patent fact, there could be no claimants, no one whose interest in the vessel required the protection of judicial proceedings. As no sale of such a vessel was contemplated, no action of a court was necessary in order to give a clear title to a purchaser. No question of relative force could arise. In short, no possible reason for such intervention of a court of admiralty can be suggested, and it is submitted that the statute contemplated no such intervention. Here, then, is a clear instance of the right

of the United States to hold a naval capture as its own "property" without condemnation.

The act of July 2, 1864, § 7 (12 Stats., 377), provided as follows:

> *And be it further enacted*, That no property seized or taken upon any of the inland waters of the United States by the naval forces thereof, shall be regarded as maritime prize; but all property so seized or taken shall be promptly delivered to the proper officers of the courts, or as provided in this act and in the said act approved March 12, 1863.

By that act and the act of March 12, 1863 (12 Stats., 820), the property was to be delivered to the agents of the Treasury, who were to sell it, unless it were appropriated to the use of the Government, without any condemnation by a court of admiralty; and even in the cases where, no Treasury agent being at hand, such property might be delivered to the proper officers of the courts, there is no suggestion that it would have to be condemned by a court of admiralty. Here is another instance of a naval capture of enemy property for the United States alone, without condemnation as prize.

Again, in the case of *The Siren* (13 Wall., 389) the capture was undoubtedly a naval capture in one sense, being made by a naval force, and it took place February 17, 1865, so that if a prize, it became such under the act of June 30, 1864; but the Supreme Court held that it could not be a prize, because of the cooperation of the Army (though the actual capture was by the

Navy), and "no provision is found in any of these statutes touching joint captures by the Army and Navy." The words "no provision" are sweeping, and amount to this, that no part of the act of 1864 applied to such a capture at all, so that no proceedings under that act were necessary. The United States was entitled to the property *jure reipublicæ*, and not under the act of 1864 at all. Even if it should be thought that this case, being one of "joint capture," though the Navy did the actual work of capture, is not precisely in point, certain statements in the opinion have a bearing on the present contention. It is said, "all captures made without their express authority [i. e., the authority of the United States] inure *ipso facto* to their benefit." The words *ipso facto* indicate that no judgment of a court of admiralty is required. It is also said, "The United States take captured property, not as droits [of admiralty], but strictly and solely *jure reipublicæ*." Capture as droits of admiralty involved condemnation to the Lord High Admiral, but the United States take such captured property as it is entitled to "solely *jure reipublicæ*," i. e., without condemnation. These statements do not refer exclusively to cases of "joint capture," but to all captures not made under an act of Congress authorizing them to be made for the benefit of the captors.

It is true that in *The Siren* Judge Lowell, in the district court, had considered condemnation to the United States desirable as a general rule, even if not essential (*The Siren*, 1 Low., 280), and that this court affirmed his decree; but that case involved valid claims for

salvage, and on account of a collision, which called for the action of a court, and the district attorney had seen fit to seek condemnation of the vessel. Under these circumstances, the United States having submitted to the jurisdiction, and the ends of justice having been attained, this court may well have decided to let the proceedings be concluded by a simple affirmance; but the language of the decision is clear to the effect that the United States is entitled to take captured property "solely *jure reipublicæ*"—i. e., without condemnation.

The case of *Mrs. Alexander's Cotton* (2 Wall., 423) would seem, however, to make argument unnecessary. The court there said:

> We think it clear that the cotton in controversy was not maritime prize, but should have been turned over to the agents of the Treasury Department, to be disposed of under the act of March 12, 1863.

If this decision means anything, it means that the United States, before the act of June 30, 1864, took property captured by a naval force on land not as maritime prize, but solely *jure reipublicæ*. That decision deprives the contention of libellant's counsel of all foundation whatever. A naval capture of property on land is *not* maritime prize and, hence, sections 4613 and 4630 do not apply to it. According to the libellant's contention the court should have held that the property was not maritime prize for the benefit of the captors, but was such for the benefit of the United States, so that the condemnation should be to the

United States; but, instead of this, it was held that the property, though a perfectly lawful capture by a naval force, was not maritime prize at all and that there should have been no condemnation; in fact, no proceedings in admiralty whatever.

The effect of these evident instances of the recognition of a right of the United States to make a naval capture for itself alone, without condemnation as prize, can not be avoided by saying that this right can only exist in consequence of some statute. It can not fairly be contended that in the case of *Mrs. Alexander's Cotton*, for instance, the act of March 3, 1863, applied to all captures on land, but that otherwise captures by a naval force on land would have been maritime prize for the benefit of the United States. Such a contention wholly overlooks the last section of that act, reading as follows:

> SEC. 7. *And be it further enacted*, That none of the provisions of this act shall apply to any lawful maritime prize by the naval forces of the United States. (12 Stats., 821.)

What *Mrs. Alexander's Cotton* held was that property captured on land "was not maritime prize," so that there should have been no condemnation by a prize court, not even to the United States, and that therefore the act of 1863 applied to it. Had it been maritime prize for the benefit of the United States, though not for that of the captors, the act of 1863 could not have applied to it at all. This is therefore a manifest instance of a right to retain a naval capture, without adjudication as prize, where no statute had expressly

authorized such retention. As to the act of 1799, the answer to the contention is that a statutory declaration that captured national ships of war should belong to the United States was needed, because it was desired at the same time to grant prize rights in all other captured vessels of an enemy, and to give bounty, in lieu of prize, for the captures to which prize rights were not to extend. There was no previous obligation upon the United States to have ships of war condemned if it wished to retain them, but the statute simply declared that they would be retained, and the fact that no condemnation was necessary followed as a matter of course. Another reason for the declaration was that under the ordinances of the Continental Congress all captured vessels were prize, at least since the repeal of the bounty ordinance as to vessels of war.

It is true that in *United States* v. 269½ *Bales of Cotton* (1 Woolw., 236, 245), Miller, J., said that "there are certain reasons, founded upon the general principles of international law, why every capture upon the high seas, *jure belli*, shall be carried before a prize court," but the reasons which he gives apply to the high seas only, to which he confines his statement, and they do not apply to public property captured from an enemy. As to all ships and vessels and their cargoes taken on the high seas, the statutes in force in 1898 required condemnation whether the property was public or private, but this was obviously because the captors had rights in all such property. As to property taken from vessels of war sunk or otherwise destroyed, for which

bounty was given in lieu of prize, there is no need of adjudication, even by the view taken by Miller, J., and it is submitted that the statutes never contemplated it.

It being indisputable, under the decision in *Mrs. Alexander's Cotton*, that the United States can, under certain circumstances, acquire the property of an enemy for itself, by the act of its naval force, without making such property maritime prize within the meaning of section 4613 of the Revised Statutes, it follows that the contention that all property captured by a naval force is prize can not stand, and that, on the contrary, only such captures as the statutes expressly provide shall be for the benefit of the captors can so inure.

Proceeding upon the erroneous theory that "capture" and "prize" are convertible terms, the counsel for Admiral Dewey undertake in their brief to define what they call "the essentials of capture," as:

(*a*) A subject of capture.

(*b*) A capturing force.

(*c*) The taking of the subject of capture from the possession of the enemy into the possession of the captors.

While this definition is true as far as it goes, it is inadequate for the purposes of this case, because the question is not whether the property libeled was captured, but whether it was captured as prize for the benefit of the captors. Hence for those purposes another "essential" must be added, viz: The taking of

the subject of capture under such conditions as make it, by virtue of the statutes, prize for the benefit of the captors.

The application of the general principles just dwelt upon will now be considered.

QUESTIONS RAISED BY THE APPEAL OF THE UNITED STATES.

1.

STATUS OF VESSELS SUNK OR DESTROYED IN ACTION AND AFTERWARDS RAISED AND RECONSTRUCTED.

[See first assignment of error.]

The libel in this case was filed against, *inter alia*, the Spanish war vessels *Don Juan de Austria*, *Isla de Cuba*, and *Isla de Luzon*, which were sunk and burned at the close of the action of May 1, 1898, but raised and reconstructed for the United States Navy, by a foreign corporation, after hostilities ceased. This item is not inconsiderable, the net value of these vessels, after deducting the cost of raising them, bringing them to Hongkong, and repairing them, being estimated by Naval Constructor Hobson, who had charge of the repairs, at $306,000, according to his official report.

The position of the Government in regard to these vessels has always been as follows: At or immediately after the close of the battle, they were sunk and otherwise destroyed, to such an extent that the libellant's naval force was powerless to do anything with them of their own resources, and it cost very nearly 50 per cent of their ultimate value to raise them and make

them what they were before. They were officially reported as destroyed, and for five months no attempt was made to do anything with them. After hostilities ceased, the vessels were inspected, and more than six months after the battle they were raised by foreign contractors. These subsequent acts, done after hostilities ceased, were not a part of the act of capturing these vessels, and had no effect upon their legal status as "sunk or otherwise destroyed;" and the Government admits that, assuming that these vessels had their full complement of men on board, the libellant and his naval force are entitled to receive $49,100 as bounty for their destruction under section 4635 of the Revised Statutes.

The court below, however, held—

> that the libellant is entitled to an adjudication of one-half of the value of these vessels to the captors, such value being the net value shown by the evidence, less the cost of repairs and cost of raising, it being conceded that the Spanish fleet alone was of inferior force, and that the question of the right to count the land batteries, mines, and torpedoes as part of the Spanish force under section 4630, R. S., U. S., was determined against libellant in *Dewey* v. *United States* (178 U. S., 510).

The question in regard to these vessels is this: If an enemy's vessel of war, when overcome by a naval force of the United States, is no longer afloat, but lies on the bottom, and can only be made to float by elaborate wrecking operations which are not within the

power of such naval force to carry out, but must be performed by parties who make a business of such work, and if such vessel is also so far destroyed by fire above her water line as to make her useless as a vessel of war without substantial reconstruction, and if the United States Government, after hostilities cease, makes a contract under which such vessel is subsequently floated, reconstructed, and refitted, by the contractors, is she a "captured vessel" within the meaning of section 4615 of the Revised Statutes, and a proper subject of proceedings in prize?

In accordance with the general principles of prize law, already considered in this brief, it is clear that unless the statute, strictly construed, makes an enemy's vessel of war, recovered and reconstructed under such conditions, a prize for the benefit of the captors, no prize money can be due on account of such vessel.

The first point to be noticed in this connection is that the statutes regulating naval prize make a distinction between hostile vessels of war and other vessels of an enemy. If the latter are irrecoverably sunk or totally destroyed in the attempt to capture them, or in order to prevent their being recaptured, so that there is nothing left ot them or of the property on board of them, which can either be sent in as prize, or sold, or appropriated for the use of the Government, no benefit whatever accrues to the naval force concerned in the affair, and even where property is sold or appropriated to the use of the Government, the prize money obtainable is strictly limited to the appraised

value of such property; whereas, in the case of hostile vessels of war, the naval force which sinks or destroys them is entitled, under section 4635, to bounty as a substitute for prize money.

The reason for this distinction is obvious. In modern warfare, as distinguished from piracy and brigandage, the main object of all captures is not to enrich the capturing force, or its country, but to injure the enemy and thus shorten the war. Some captures may incidentally enrich the captors themselves or the government of their country, but the capture of prisoners, for instance, while the greatest injury to the enemy, is a positive disadvantage to the capturing force, as the prisoners must be guarded, housed, and fed.

In old times, it is true, the contrary principle prevailed, and enemy property was captured for the sake of its acquisition, while prisoners were either held to ransom, for the enrichment of their captors, or else killed; but the gradual tendency of civilization has been not merely to make war more humane, but to make it less predatory, and, if possible, more destructive. The sacking of cities is a thing of the past, and the capture of land booty, formerly upheld and regulated by law, is now recognized as an offense against military discipline as well as against humanity. This latter practice was, in fact, never authorized by any statute of the United States, although maritime prize was permitted and regulated until the passage of the act of March 3, 1899, section 13. (30 Stats., 1007.)

When an enemy loses a merchant vessel, he loses property only, but when he loses a vessel of war, he

loses what is much more important than the money value of the property, viz, available fighting force; and while the destruction of merchant vessels, in case they could not be captured, was not a thing to be encouraged, on account of the risk of violation of neutral rights, yet as any injury to an enemy's fighting force is a matter of great importance, and as this injury is as complete (unless the crew escapes) when an enemy's vessel of war is sunk or otherwise destroyed as when it is captured, our statutes, from 1800 to 1899, have given a substantial reward for the sinking or other destruction of hostile vessels of war. Hence when Lowell, J., said, "The grant [of bounty] is intended as a substitute for the prize itself" (*The Selma*, 1 Low., 30, 32), and when Field, J., referred to "prize money or bounty in lieu of it" (*Porter* v. *United States*, 106 U. S., 607), they did not mean that bounty was given merely because the prize was lost, but that bounty was given as a reward for the injury inflicted upon the enemy's naval fighting force, for which injury a reward was considered to be due, whether the hostile vessel of war was captured or destroyed

In view, then, of the policy of granting a reward for the injury to the enemy's fighting force, by the sinking or destruction of vessels of war, what degree of destruction was necessary to bring a case within the bounty statute? The statute (Rev. Stats., sec. 4635) reads as follows:

> SEC. 4635. A bounty shall be paid by the United States for each person on board any ship or vessel of war belonging to an enemy at

> the commencement of an engagement, which is sunk or otherwise destroyed in such engagement by any ship or vessel belonging to the United States or which it may be necessary to destroy in consequence of injuries sustained in action, of one hundred dollars, if the enemy's vessel was of inferior force, and of two hundred dollars, if of equal or superior force, to be divided among the officers and crew in the same manner as prize money; and when the actual number of men on board any such vessel can not be satisfactorily ascertained, it shall be estimated according to the complement allowed to vessels of its class in the Navy of the United States; and there shall be paid as bounty to the captors of any vessel of war captured from an enemy, which they may be instructed to destroy, or which is immediately destroyed for the public interest, but not in consequence of injuries received in action, fifty dollars for every person who shall be on board at the time of such capture.

Does this statute only affect cases of total destruction of the enemy's vessel, or does it extend to any cases where such vessel, though incapable of being sent in for adjudication at the time, might still have some value if recovered and reconstructed or repaired? In answering this question it is worth while to notice the origin and history of naval bounty. Originally in England it was not limited to cases of the sinking or destruction of vessels of war, and was given in addition to prize money, not in lieu of it.

The first British statute on the subject appears to be 13 George II, c. 4, s. 15, worded as follows:

> And as a further encouragement to the officers, seamen, marines, soldiers, and others on board His Majesty's ships of war, as also of privateers, to attack, take, and destroy any ships of force belonging to the enemy, be it enacted by the authority aforesaid that there shall be paid by the treasurer of His Majesty's navy, upon bills to be made forth by the commissioners of the navy, to be paid according to the course thereof, without fee or reward, unto the officers, seamen, marines, soldiers, or others that shall have been actually on board such of His Majesty's ship or ships of war, or privateer or privateers, in any action where any ship or ships of war, or privateers shall have been taken from the enemy, sunk, burnt, or otherwise destroyed, £5 for every man which was living on board any ship or ships so taken, sunk, burnt, or otherwise destroyed, at the beginning of the engagement between them.

Precisely the same language is found in the subsequent acts of 17 George II, c. 34, s. 18; 29 George II, c. 34, s. 21; 17 George III, c. 7, s. 16, and 33 George III, c. 66, s. 40.

The Continental Congress gave a bounty of $20 for each cannon and $8 for each man taken on any British vessel of war made prize of by any Continental vessel of war (Ordinance of November 15, 1776; 1 Jour. of Cong., 430); but this was done to stimulate captures that would increase American naval resources, and no

bounty was given in cases of sinking or destruction. Under the act of March 2, 1799 (1 Stats., 709–715), a similar bounty was given for the capture of hostile vessels of war, in lieu of prize money, for when such vessels were captured they were not prize for the benefit of the captors but became the property of the United States.

The act of April 23, 1800 (2 Stats., 53), however, abolished the Government's right to appropriate hostile vessels of war, and it made them subject to adjudication in prize, like other captured vessels. Section 7 of this act was a distinct recognition of the modern idea that war should be destructive, but not predatory. Recognizing that in naval engagements the important thing was to reduce the enemy's fighting force, and that such reduction of force was equally important whether it was accomplished by capture or by destruction, and should lead to some reward in either event, Congress enacted:

> That a bounty shall be paid by the United States of twenty dollars for each person on board any ship of an enemy at the commencement of an engagement, which shall be sunk or destroyed by any ship or vessel belonging to the United States of equal or inferior force, the same to be divided among the officers and crew in the same manner as prize money.

Prior to the enactment of this section the victors in the most stubborn sea fight were, under the American statutes, entitled to nothing whatever by way of special

reward unless they brought an enemy's vessel or property into port. This section introduced the rule that if, on account of the sinking or destruction of an enemy's ship of greater force than, or equal force with, the American vessel in engagement with her, she could not be held as prize, bounty should be paid, but that if an enemy's ship were captured, the captors would be entitled to prize money only. Bounty was thus for the first time made a substitute for prize money, recoverable when the enemy's vessel was of equal or greater force, and only in cases where, owing to the sinking or destruction of such vessel, there could be no prize money. It was apparently assumed that if the enemy was of inferior force his vessel would be captured, and not sunk or destroyed.

It is to be observed, moreover, that the right to bounty was not, like that of prize money, necessarily limited to cases of victory over the enemy's naval force. In an action where the hostile force was equal or superior, the sinking or destruction of any one or more of the enemy's war vessels would give rise to a right to bounty, even though the action as a whole should result in the defeat of the American force. Even if it was itself finally compelled to surrender, its right to bounty would remain.

The act of June 26, 1812, section 9 (2 Stats., 761), provided for payment of bounty to privateers for any armed ship or vessel of the enemy, of equal or superior force, when burnt, sunk, or destroyed. The act of March 3, 1813 (*id.*, 816), gave a very large bounty for

the burning, sinking, or destroying of British armed vessels of war by any persons not belonging to the navy or privateers. This latter act was merely intended to encourage the destruction of vessels, and has nothing to do with the general system of prize and bounty.

The act of July 17, 1862, section 4 (12 Stats., 606), which was reenacted in the act of June 30, 1864, section 11 (13 Stats., 310), and afterwards in section 4635 of the Revised Statutes, enlarged the right to bounty by providing that it should be paid in all cases where an enemy's vessel of war was sunk or otherwise destroyed, either in an engagement or in consequence of injuries received in action, or after capture, where such destruction was for the public interest. The concluding provision of the section, applying to cases of destruction after capture, was required in order to carry out fully the principle on which the bounty system had been based ever since 1800, viz, to give a reward, in place of prize money, where the enemy's vessel, owing to its destruction, could not be sent in to a prize court. The act of 1800 had given this reward only where the enemy's vessel was of equal or superior force, and only when she was sunk or destroyed at the time of the engagement, while that of 1862 gave rewards, differing in amount according to circumstances, in all cases where, owing either to the engagement itself or to conditions affecting the public interest immediately after capture, an enemy's vessel of war was sunk or destroyed.

This review of the statutes shows conclusively that prior to the act of June 30, 1864, the sole object of the

law, as now found in section 4635 of the Revised Statutes, was to provide a reward in the nature of prize money in all cases where, owing to the sinking or destruction of an enemy's vessel of war either during or immediately after an engagement, prize money could not be obtained, and not merely to provide, as the British statutes had done, a special reward for successful gallantry in combat with a vessel of war, whether such vessel was captured, sunk, or destroyed. The rights to prize money and to bounty were alternative rights, the latter right being at first somewhat limited, but afterwards enlarged (by the act of 1862) so as to come into existence in every case where an enemy's vessel of war was overcome under circumstances which then or immediately thereafter prevented her being the subject of adjudication as prize. Hence Lowell, J., said, "The grant [of bounty] is intended as a substitute for the prize itself" (*The Selma*, 1 Low., 30, 2), and Field, J., referred to "prize money or bounty in lieu of it" (*Porter* v. *United States*, 106 U. S., 607).

The rights of prize and of bounty being, therefore, before the act of June 30, 1864, complete alternatives of each other, it is easy to draw the line between them and to say where one ended and the other began. There being no law under which rights of prize could accrue unless prize property had been physically brought within the control of the "judge of the district to which such prize is ordered to proceed" (act of 1862, § 5) for adjudication, it is evident that under

the act of 1862 bounty was due in all cases where in a naval action a vessel of war was lost to the enemy, but could not be sent to an American port for adjudication, because it was sunk or destroyed either during the action, or in consequence of injuries received therein, or on account of some controlling public necessity, provided in the last instance that the destruction had taken place immediately after capture. Whether bounty or prize money was due, the reason for the reward was the same, viz, the injury inflicted upon the enemy's fighting force by the loss of the vessel, and the question as to which was due, bounty or prize money, depended in each case upon whether the vessel could or could not be sent in for adjudication. If it could not, then bounty alone was obtainable, while if it could, then a prize crew should be put aboard and the proper proceedings in prize should be instituted as soon as the vessel reached the designated port. The only circumstance under which neither bounty nor prize money could be obtained was where a prize was lost on its way to port, a possibility which the law did not provide for either at that time or subsequently, so that it may be disregarded.

The question of whether an enemy's vessel of war which had been overcome was the subject of prize proceedings or of bounty was thus determined by the statutes, and was in no way affected by the policy of the Navy Department or the preference of the parties who were entitled to claim either bounty or prize money.

The words "sunk or otherwise destroyed," in section 4 of the act of 1862, must, therefore, at the time that act was passed, have been equivalent to "rendered incapable of serving as a part of the enemy's fighting force, and also incapable of being sent in for adjudication." The captors of a vessel taken as prize had no rights at all in her before adjudication, except to put a prize crew aboard and send her in for adjudication. (*Home* v. *Camden*, 2 H. Bl., 533; *The Elsebe*, 5 Rob., 178; *The Felicity*, 2 Dods., 381.) Even the fact that a vessel would bring more if sold on the spot where taken than at the port of adjudication would not justify such a sale. (*The Eole*, 6 Rob., 220; *The Leucade*, 2 Spinks, 228.) If she were aground and they could pull her off, they had, of course, a right to do so, just as they could supply her, if a sailing vessel, with any necessary spars or sails, or, if she were a steamer, repair her engines or supply her with coal; but the prize statutes have never made any provision for the carrying on of wrecking operations by the captors, or at their expense, for the purpose of floating a sunken vessel. The most probable reason for this is that, as the captors have no title to the proceeds of captured vessels or property until after adjudication, it was not to be expected that they would incur the cost of wrecking operations in regard to property which was not their own and to the proceeds of which they could have no title until a court decided in their favor. If an enemy's vessel of war was rendered incapable of being navigated or towed, without a resort to wrecking operations carried on by persons not belonging to the

naval force which overcame such vessel, she manifestly could not, under the act of 1862, have been the subject of proceedings in prize, because the naval force concerned had no rights which would entitle them to authorize outside parties to conduct wrecking operations.

It could not fairly have been contended, under the act of 1862, that where an enemy's vessel of war had been made incapable of floating, as far as the resources of the American naval force went, so that she could not be sent in for adjudication, no bounty should be paid, because she was neither annihilated nor sunk beyond the possibility of recovery. All that was needed to satisfy the conditions of the bounty sections of the act was that the vessel should no longer constitute an available part of the enemy's fighting force. To hold that the words "sunk or otherwise destroyed" necessarily meant annihilated or sunk beyond the possibility of recovery by any human means, would be as unreasonable as to hold that "permanent" means "lasting forever." It has repeatedly been held that a covenant for the permanent establishment for an institution in a certain place does not bind the covenantor never to remove it. It is enough that he should, at the time of establishing the institution, have no intention of removing it. (*Mead* v. *Ballard*, 7 Wall., 290; *Newton* v. *Commrs.*, 100 U. S., 548; *Texas*, &c. *Ry. Co.* v. *Marshall*, 136 *id.*, 393; *Sumner* v. *Darnell*, 128 Ind., 38; *Hardy* v. *Wiley*, 87 Va., 125.) Similarly, a reasonable construction of the words "sunk or otherwise destroyed" in the act of 1862, would cover all cases

where the vessel could not be raised and made available as a vessel of war without considerable expense and within a considerable length of time.

The title to whatever remained of an enemy's vessel of war which had been "sunk or otherwise destroyed," i. e., rendered incapable of serving as a part of the enemy's fighting force and of being sent in for adjudication, would depend of course upon the control of the waters in which the wreck might chance to lie. By the laws of war it would pass to the United States, *jure reipublicæ*, like property captured by a joint naval and military force (*The Siren*, 13 Wall., 387), provided the United States controlled the waters where it lay, but not otherwise. If an American naval force entered hostile waters, destroyed a vessel of war, and immediately withdrew, the property in whatever remained of such vessel would still be in the enemy; but if the American naval force stayed in control of those waters, the property in the destroyed vessel would be in the United States. It would be a case of capture, though not of prize for the benefit of the captors, and if the United States wished to make any use of whatever remained of such vessel, it could do so, without any liability to the captors. Such was manifestly the law under the act of 1862.

The act of June 30, 1864, section 1 (13 Stats., 310), introduced a new provision into the prize law as follows:

> If the captured vessel, or any part of the captured property, is not in condition to be sent in for adjudication, a survey shall be had

> thereon and an appraisement made by persons as competent and impartial as can be obtained, and their reports shall be sent to the court in which proceedings are to be had; and such property, unless appropriated for the use of the Government,[a] shall be sold by the authority of the commanding officer present, and the proceeds deposited with the assistant treasurer of the United States most accessible to said court, and subject to its order in the cause.

This provision, which now forms part of section 4615, Revised Statutes, is the alleged authority for the libel as regards the *Don Juan* and the two *Islas*. These vessels, it is contended, were "appropriated for the use of the Government," as prizes "not in condition to be sent in for adjudication." The meaning of this provision requires therefore very careful consideration.

In the case of merchant vessels and their cargoes the above-quoted provision of the act of 1864 increased the rights of the captors by enabling them to sell, either to the Government or to outsiders, such captured vessels or other property as could not, owing to their condition, be sent to a court for adjudication; but in the case of an enemy's vessels of war this new provision must be construed in connection with section 11 of the same act, which was a reenactment, word for word, of section 4 of the act of 1862, the section in regard to

[a] The words "unless appropriated to the use of the Government" refer to another provision of the same act, contained in section 27 (now section 4624, R. S.), that whenever any captured vessel or other property was taken for the use of the Government, before it came into the custody of a prize court, it should be appraised, and the survey, appraisement, and inventory should be sent to the court, with which also the value should be deposited.

bounty. It is a familiar rule of construction that all statutes "relating to the same subject-matter shall be considered together" (*United States* v. *Babbit*, 1 Black, 55), and, *a fortiori*, all parts of the same statute should be so construed as to harmonize (Black, Interp. of Laws, 60.) In reenacting section 4 of the act of 1862 as section 11 of the act of 1864 Congress must have intended that this section should have the same meaning and effect as it had previously had, and the new provisions of section 1 must be so construed as to harmonize with that meaning and effect, there being nothing in the language of section 1 to prevent such harmonizing. Construing these sections in harmony with each other, it is clear that where an enemy's vessel of war remained afloat, but was so far injured that it could not safely be sent in for adjudication, it might, under this new provision, be sold either to the United States or a third party, if either were willing to take it, and would not necessarily have to be destroyed "in consequence of injuries sustained in action," as contemplated in the bounty section. Such a vessel, if sold, would not come into the category of vessels "sunk or otherwise destroyed," because its sale would obviate the necessity of destroying it. On the other hand, as regards an enemy's vessel of war which was not merely "not in condition to be sent in for adjudication," but actually "sunk or otherwise destroyed" within the meaning of the bounty section, so that it was beyond the power of the American naval force to navigate it at all, or even to float it, there is nothing to indicate that any change

was intended. Under section 4 of the act of 1862, the captors had no prize rights in such vessels, but received bounty instead, and there is nothing to indicate that the words of that section, which remained wholly unchanged, were intended to have a different meaning in the act of 1864 from what the same words had had in the act of 1862. The property in such vessels being in the United States, if it remained in control of the waters where the vessels lay, the captors had no right to sell such vessels (except for Government account), while no actual appropriation for the use of the Government could add anything to its rights of ownership. It could not possibly have been intended to grant bounty for the destruction of such vessels, and also prize money in case whatever remained of them could be sold, for bounty is a substitute for prize money. (*Porter* v. *United States; The Selma*, both cited above.) As to such vessels, therefore, the law remained as it had been under the act of 1862, and there was indeed no need for any change, since the rights of the officers and men concerned were already liberally provided for.

The final stage in the history of the law on this point, prior to the filing of the present libel, was the adoption of the Revised Statutes, when section 1 of the act of 1864 was reenacted as section 4615, section 27 as section 4624, and section 11 (in regard to bounty) as section 4635, with no change except trifling verbal ones.

It follows from what has been above stated that if an enemy's vessel of war is sunk or otherwise destroyed by a naval force of the United States, within

the meaning of section 4635, such naval force is entitled to bounty, but has no interest whatever in the vessel itself, which must be regarded as having been captured for the benefit of the United States. Hence, if the United States sees fit to raise the vessel if sunk, or to remove and use or sell portions of it if otherwise destroyed, it can do so without any liability to the captors whatever.

In the present case, however, the court below held that the *Don Juan de Austria*, *Isla de Cuba*, and *Isla de Luzon*, which, after the battle, were lying on the bottom, full of water, with their upper works destroyed by fire, but ultimately, after the cessation of hostilities, were raised, reconstructed, and refitted by a foreign corporation, under contract with the United States, and were appropriated to the use of the United States, were not "sunk or otherwise destroyed" within the meaning of section 4635, but were prize for the benefit of the captors, so that they are entitled to prize money, under section 4630, and not to bounty under section 4635.

In determining the status of these vessels, the first point to note is that if they were not prizes at the close of the battle they could not become so by subsequent raising and appropriation. Under the United States statutes, in force in 1898, vessels could be condemned as prize by virtue of capture only. If a vessel when finally captured were sunk or stranded, and the capturing naval force raised or floated it by its own unaided efforts, the vessel would be condemned as a prize, but only in consequence of the capture, not in

consequence of the act of the naval force in making the vessel float. Moreover, a condemnation is only possible in cases of capture by a naval force exclusively; and this rule is rigidly applied, so that captures made by a naval force, when conducting operations in conjunction with a land force, are not prizes at all. Not merely must the actual, physical taking have been done by a naval force, but the circumstances must have been such that no other force was in any way connected with the operations in the course of which the capture was made. (*The Siren*, 13 Wall., 389.)

Hence where, as in the present case, an enemy's vessel of war is sunk or burnt, or both, in action, and afterwards raised or reconstructed, or both, by any party outside the naval force, it is manifest that such vessel could not *become* a prize in consequence of such raising or reconstruction.

Similarly where, as in the present case, vessels have been appropriated for the use of the United States, such appropriation is only of importance as explaining why the vessels were not physically sent in for adjudication and as affecting the form of the decree to be entered in regard to them. The appropriation could not make these vessels prize if they were not so already, any more than it could prevent their being held to be prizes if they were originally captured as such. Whether a captured vessel is prize or not depends upon the circumstances under which it is captured, but, given those circumstances, capture alone

can make the vessel prize, and no subsequent appropriation to the use of the Government can affect the matter one way or the other.

If raising and appropriation can not make a vessel prize, it is manifest that they can not change the status of a vessel which is "sunk or otherwise destroyed," within the meaning of section 4635, so as to make it a prize. Not merely do the rights of the members of an American naval force, whether as captors of prizes or as parties entitled to bounty, accrue *in consequence* of a naval engagement, but also they must accrue at its close. The statutes certainly indicate that they do so accrue, although they are not absolute in either case until adjudication. There is nothing in the statutes to suggest that these rights can change after they have once accrued, and in fact section 4635 clearly indicates the contrary. This section provides a bounty where an enemy's vessel of war is captured and then "destroyed for the public interest," as well as where the destruction occurs in the engagement, but in the former case the destruction must take place "immediately," i. e., immediately after the engagement. If a captured vessel of war is destroyed immediately, bounty is obtainable, but if not, she remains a prize; and if lost from any cause, whether by destruction for the public interest or not, before she is brought to port, neither bounty nor prize money is obtainable. These statutes being worded as they are, it is inconceivable that Congress should have intended that where a vessel of war was sunk or otherwise destroyed, so that the

naval force concerned was clearly entitled to bounty, the fact that the Navy Department should afterwards (six months afterwards in the present case) see fit to raise the vessel, should turn the vessel into a prize, and the parties entitled to bounty into captors entitled to prize money.

Even if it could possibly be held that vessels which were, at the close of a battle, "sunk or otherwise destroyed," within the meaning of section 4635, could afterwards become prizes in consequence of being raised and appropriated, it could not be so held in the present case, as there was no raising or appropriation until after hostilities had ceased. As a matter of fact, there was no formal appropriation under section 4624 at all, but even if that fact be disregarded, it was impossible that the Government should appropriate these vessels as *prize property* until they were raised, for even on the theory of the court below, it was impossible to know, until they were raised, whether they were prizes or not. In *United States* v. *Sampson* (No. 273), it is in evidence that the Government had contractors at work upon the *Cristobal Colon* for some weeks, but finally abandoned the task of raising it, and the vessel was ultimately held to have been "sunk or otherwise destroyed," and bounty was decreed to be paid accordingly (*Sampson* v. *United States*, 35 C. Cls. R., 578.) Hence the Government's appropriation of prize vessels, as such, can not take place before such vessels are afloat.

The protocol between the United States and Spain, signed August 12, 1898, provided as follows:

> The United States will occupy and hold the city, bay, and harbor of Manila, pending the conclusion of a treaty of peace which shall determine the control, disposition, and government of the Philippines. * * * * Upon the conclusion and signing of this protocol, hostilities between the two countries shall be suspended. (30 Stats., 1742.)

These vessels were not raised until November 5, 19, and 23, 1899, respectively, and of course were not appropriated until those dates—three months after hostilities had ceased—or, in other words, until a time when prizes could no longer be taken. Conceding, for the sake of the argument, that a vessel which is no longer afloat, and which consequently is not held as a prize, can become a prize if raised and appropriated by the Government, such appropriation to have such an effect must occur during the period of hostilities. Vessels or other property can only become prize of war by some act of overt hostility to the nation to which such vessels or other property belonged. Even if it be conceded that the appropriation by the United States Government of the wreck of a Spanish vessel, *flagrante bello*, was an act of overt hostility to Spain, such an appropriation could not be hostile when Spain, whether by protocol or treaty, had relinquished the vessel and had agreed to take no steps to recover it. At the time when the appropriation of these vessels was made not merely had hostilities ceased, but the American occupation of

the place where the vessels lay had been agreed to by Spain. Hence the appropriation was a perfectly peaceful act as regards Spain, and it could not render the vessels prize of *war* for the benefit of the captors.

Moreover, the raising of these vessels, the event which was essential to their being subject to adjudication as prizes, took place after the arrival of the army had made it impossible for the navy to take prizes in Manila Bay. Conceding, for the sake of the argument, that a vessel need not be made prize by the single act of capture, but that she may be made prize by a series of acts the final consummation of which takes place somewhat later, it is evident that such consummation can not have this effect if it occurs at a time when, or under circumstances under which, prizes can not be taken.

If, therefore, after the battle of Manila Bay the *Don Juan* and the two *Islas* were "sunk or otherwise destroyed" within the meaning of section 4635, neither the subsequent raising nor the appropriation to the use of the Government can have changed their status or have made them prize.

In determining whether these vessels were "sunk or otherwise destroyed" considerable aid will be got by observing the recent decisions under section 4635, the course pursued by the libellant in regard to these vessels, the understanding of the Navy Department, the actual condition of the vessels themselves, and the work which was done upon them.

Recent decisions under section 4635.

In *Dewey* v. *United States* (178 U. S., 510; 35 C. Cls. R., 172) the Court of Claims in applying this statute held that the following vessels were "destroyed by the vessels of war of the United States: *Reina Cristina*, *Castilla*, *Don Juan de Ulloa*, *General Lezo*, *Marques del Duero*, *Argos*, *Velasco*, and *Isla de Mindanao*, and two torpedo boats," and accordingly judgment was rendered for the amount due under section 4635 on account of all these vessels. It appears from Admiral Dewey's illustrated report (Appx., 69), which was a part of the evidence upon which the Court of Claims based its judgment, and which was not controverted in any way and is a part of the record in the present case, that very considerable portions of the *Reina Cristina*, *Castilla*, *Don Juan de Ulloa*, *Velasco*, and *Isla de Mindanao* remained above water, evidently accessible and capable of being removed. Moreover, there is undisputed testimony to the effect that, as a mechanical problem, everyone of those vessels could have been raised, although their raising and reconstruction would have cost more than in the case of the *Don Juan* and the two *Islas* (Rec., 60).

In *Sampson* v. *United States* (35 C. Cls. R., 578) the Court of Claims found that "the *Vizcaya*, *Almirante Oquendo*, *Cristobal Colon*, *Pluton*, and *Furor* were destroyed," and judgment for the amount due under section 4635, on account of all these vessels, was thereupon rendered. It appears from the "Report of the Board on Condition of Spanish Vessels Sunk or

Destroyed" (Appx., 573), which was a part of the evidence upon which the Court of Claims reached its conclusion, and which was uncontradicted, and especially from the photographs annexed to the report, that very considerable portions of the *Vizcaya* and *Oquendo* remained above water, evidently accessible and capable of being removed. The board recommended that these vessels should be stripped and the guns and other salvable property taken from them. The same board reported that the *Colon* could probably be raised, and an attempt to raise her was carried on for several weeks, but finally abandoned. (Appx., 591, 597–600.)

From the action of the Court of Claims in these two cases it is evident that the word "destroyed" was not held to mean totally destroyed or annihilated. A destroyed vessel, according to the view of that court, might have a great deal of its structure still remaining and might still contain guns and other articles of value. From all this it is evident that a vessel may be "sunk or otherwise destroyed," within the meaning of section 4635, although still capable of being raised and floated, or although an attempt to raise her has been carried on for some time, but finally abandoned, or although, while she can not be floated, a large part of her may still remain capable of being removed. The conclusion to be drawn is that the words "sunk or otherwise destroyed" are equivalent to "rendered incapable of service as a vessel of war without extensive reconstruction," and also "rendered incapable of being

floated by ordinary means such as a naval force is provided with." Thus, if a vessel lies on the bottom in shallow water, but so placed or in such a condition that she can not be floated by any of the means ordinarily possessed by a naval force, such vessel must be regarded as "sunk" within the meaning of the statute, even though she has received no structural injury; or if a vessel, though not sunk, be so structurally injured as to destroy her power of floating, and she can not be repaired by any means possessed by the naval force in the place where she lies, such vessel must be regarded as constructively or legally "destroyed" within the meaning of the statute, even though substantially all the material of the vessel may remain.

A rather striking analogy is furnished by the cases of constructive total loss of a vessel, such as justifies an abandonment to the underwriters. One difference between those cases and cases under section 4635 is that in the former the owner of the vessel need not abandon it unless he see fit to do so, whereas under section 4635 there would seem to be no right of election, on the part of the captors, as to whether the vessel shall be treated as destroyed or as a prize; and another difference is that the owner of a submerged or stranded vessel could contract with a third party to raise it, which captors apparently could not do; but in most other respects the analogy would seem to be close.

It is an established rule in this country that if a vessel has been injured by any of the perils insured against, to such an extent that the cost of repairs would

be more than 50 per cent of her value, the owner may abandon her and claim a total loss. (*Peters* v. *Phœnix Ins. Co.*, 3 Serg. & R. Pa., 25; 3 Kent's Comm., 14th ed., 329.)

If a vessel be no longer afloat, however, and can not readily be made afloat, the owner may abandon her even if the cost of floating and repairing her would not necessarily be 50 per cent of her value. This point was very elaborately discussed in *Peele* v. *Merchants Ins. Co.* (3 Mas., 27). In that case an abandoned vessel had been floated and repaired by the insurers, for less than half her value, but it was held that the abandonment was valid, so that the insurers could not require the owners to take the vessel back, but were liable on the policy. The conclusion to be drawn from the authorities was summed up by Story, J., as follows:

> The right of abandonment has been admitted to exist where there is a forcible dispossession or ouster of the owner of the ship, as in cases of capture; where there is a moral restraint or detention which deprives the owner of the free use of the ship, as in case of embargoes, blockades, and arrests by sovereign authority; where there is a *present total loss of the physical possession and use of the ship*, as in case of submersion; where there is a total loss of the ship for the voyage, as in case of shipwreck, so that the ship can not be repaired for the voyage in the port where the disaster happens; and, lastly, where the injury is so extensive that, by reason of it, the ship is useless, and yet the necessary repairs would exceed her present value. None

> of these cases will, I imagine, be disputed. If there be any general principle that pervades and governs them, it seems to be this: That the right to abandon exists *whenever, from the circumstances of the case, the ship, for all useful purposes of a ship for the voyage, is, for the present, gone from the control of the owner, and the time when she will be restored to him in a state to resume the voyage is uncertain or unreasonably distant*, or the risk and expense are disproportioned to the expected benefits of the voyage. In such a case the law deems the ship, though having a physical existence, as ceasing to exist for the purposes of utility, and therefore subjects her to be treated as lost.

In *Bradlie* v. *Maryland Ins. Co.* (12 Pet., 378, 398) the same learned jurist said:

> In many cases of stranding the state of the vessel at the time may be such, from the imminency of the peril and the apparent amount of expenditures required to deliver her from it, as to justify an abandonment, although by some fortunate occurrence she may be delivered from her peril without an actual expenditure of one-half of her value when she is in safety. * * * Mr. Chancellor Kent, in his learned Commentaries, vol. 3, 321, has laid down the true results of the doctrine on this subject. "The right of abandonment," says he, "does not depend upon the certainty, but upon the high probability of a total loss, either of the property or of the voyage, or both. The insured is to act, not upon certainties, but upon probabilities; and if the facts present a case of

> extreme hazard and of probable expense exceeding half the value of the ship, the insured may abandon, though it may happen that she was afterwards recovered at a less expense."

It was also held in the cases just cited that if the abandonment, when made, is good, the rights of the parties are definitely fixed, and do not become changed by any subsequent events.

The American doctrine of constructive total loss is perfectly reasonable, especially in view of the fact that the recovery of a submerged or stranded vessel is always a matter of uncertainty. It is scarcely possible to estimate the cost beforehand, and it is greatly affected by conditions of weather, which may cause expensive delays, even if they do not render success impossible. This doctrine is just as reasonable when applied to modern steel ships as to the wooden vessels of Mr. Justice Story's time, for though the former are much the stronger, they are many times larger and heavier than the latter, and the work of floating them involves very elaborate and costly operations. The analogy to cases of "destroyed" vessels under section 4635 is at least very suggestive as to the point that a vessel may be constructively "sunk or otherwise destroyed" when she can not be raised and reconstructed or repaired without the expenditure of considerable time and money.

The course pursued by the libellant in regard to these vessels.

At the close of the battle of Manila Bay the Spaniards sank in shallow water all of their vessels which

had remained afloat, except the *Manila* and a few small gunboats. Later on the same day the *Don Juan*, the two *Islas*, and some other vessels were set on fire by the libellant's orders, and all the combustible portions of them which were out of the water were burnt. The official reports contain the following statements:

> Immediately engaged enemy and destroyed the following Spanish vessels: *Reina Cristina*, *Castilla*, *Don Antonio de Ulloa*, *Don Juan de Austria*, *Isla de Luzon*, *Isla de Cuba*, *General Lezo*, *Marques del Duero*, *El Correo*, *Velasco*, one transport, *Isla de Mindanao*. (Dewey's dispatch of May 1, 1898, Appx., 68.)
>
> The following is a correct list of Spanish vessels destroyed May 1: Two protected cruisers, *Isla de Cuba*, *Isla de Luzon;* five unprotected cruisers, *Reina Cristina*, *Castilla*, *Don Antonio de Ulloa*, *Don Juan de Austria*, *Velasco;* two gunboats, *General Lezo*, *Marques del Duero;* one transport, *Isla de Mindanao;* one surveying vessel, *Argos*, both armed. The following have been captured: One transport, *Manila;* one gunboat, *Callao*. (Dewey's dispatch of June 12, 1898, Appx., 69.)
>
> The Spanish lost the following vessels:
>
> Sunk: *Reina Cristina*, *Castilla*, *Don Antonio de Ulloa*. Burnt: *Don Juan de Austria*, *Isla de Luzon*, *Isla de Cuba*, *General Lezo*, *Marques del Duero*, *El Correo*, *Velasco*, and *Isla de Mindanao* (transport). Captured: *Rapido* and *Hercules* (tugs), and several small launches. (Dewey's report of May 4, 1898. Appx., 71.)
>
> In obedience to a signal from flagship to destroy all shipping in the harbor, Lieutenant

> Hughes was sent ashore with a whaleboat's crew of 7 men * * * and set fire to the *Don Juan de Austria*, *Isla de Cuba*, *Isla de Luzon*, *General Lezo*, and *Marques del Duero*. * * * The *Isla de Cuba*, *Isla de Luzon*, and *Don Juan de Austria* were aground and full of water when they were fired. Their outboard valves were opened and the ships allowed to fill. * * * During the night the magazines of the *Don Juan de Austria* blew up. (Wood's Report of May 4, 1898, Appx., 81.)
>
> There remained the last recourse—to sink our vessels, and we accomplished this operation. * * * (Spanish official report, Appx., 92).
>
> At daybreak on May 1, engaged the Spanish squadron at Cavite, and the shore batteries at Cavite and Manila, the engagement resulting in the destruction of the Spanish squadron and the capture of the Cavite batteries and naval arsenal, with the armed transport *Manila*, and numerous small vessels and tugs. (Dewey's report of September 19, 1898, Appx., 127.)

It is clear from the above reports that the Spaniards succeeded in sinking the *Don Juan de Austria*, *Isla de Cuba*, and *Isla de Luzon* as far as the depth of water would permit, and that the libellant, immediately after the battle, undertook to destroy these vessels by fire, as far as their partially submerged condition made such destruction possible, precisely as he did in the case of the *General Lezo* and the *Marques del Duero;* and it is also clear from the reports that the libellant has officially stated that the *Don Juan de Austria*, *Isla de Cuba*, and *Isla de Luzon* were "destroyed," as well as other vessels

which have been judicially determined to have been in that category, and that he has in the same reports distinguished them from other vessels which were "captured." The latest report, dated September 19, 1898, is particularly significant, as at that date Constructor Capps was actually making, or perhaps had even concluded, his inspection of these "destroyed" vessels, with a view to raising as many of them as possible.

The official acts and reports of the libellant are most significant as showing that even as late as September 19, 1898, he regarded these vessels as "destroyed," and not as prizes. His course, even at a later period, when the vessels were being raised, and in fact down to July 13, 1899, when the libellant's petition in the suit for bounty was filed in the Court of Claims, manifests the same understanding on his part, and is especially significant when contrasted with his course in regard to the greater part of the other property to which the libel relates. The libel asserts that all the property as to which adjudication is sought was appropriated to the use of the United States. All cases of such appropriation are provided for by statute, as follows:

> SEC. 4624. Whenever any captured vessel, arms, munitions, or other material are taken for the use of the United States before it comes into the custody of the prize court, it shall be surveyed, appraised, and inventoried by persons as competent and impartial as can be obtained, and the survey, appraisement, and inventory shall be sent to the court in which proceedings

> are to be had; and if taken afterwards, sufficient notice shall first be given to enable the court to have the property appraised for the protection of the rights of the claimants and captors. In all cases of prize property taken for or appropriated to the use of the Government, the department for whose use it is taken or appropriated shall deposit the value thereof with the assistant treasurer of the United States nearest to the place of the session of the court, subject to the order of the court in the cause.

In the case of the *Manila*, *Barcelo*, and other vessels which are conceded to have been taken as prize, this section was strictly complied with by the captors. They did not do this immediately after the battle, manifestly because their time was fully taken up with more important matters. They had to attend to all the countless administrative and military details which the occupation of hostile territory involves. After a month, however, when they had established themselves at Cavite and could pause to take breath, the libellant issued a formal order, as follows:

> UNITED STATES NAVAL FORCE
> ON ASIATIC STATION,
> FLAGSHIP OLYMPIA,
> *Cavite, P. I., June 4, 1898.*
>
> SIR: 1. A board is hereby ordered for the purpose of surveying, appraising, and taking a careful inventory of the enemy's property captured and appropriated for the uses of the United States Government by the squadron under my command, in Manila Bay, since

April 30th, 1898, in accordance with section 4624 et seq., United States Revised Statutes.

2. The board will convene on Monday, June 6th, at 10 a. m., or as soon thereafter as practicable, on board the U. S. S. *Raleigh*.

3. The report of the board will be made in duplicate.

4. The board will be composed of yourself as senior member and of Commander E. P. Wood, U. S. Navy, and Lieutenant Carlos G. Calkins, U. S. Navy, members.

5. Passed Assistant Paymaster S. L. Heap, U. S. Navy, will act as recorder.

Very respectfully,

GEORGE DEWEY,
Rear Admiral, U. S. Navy,
Commanding U. S. Naval Force
on Asiatic Station.

Captain J. B. COGHLAN, U. S. Navy,
Commanding U. S. S. Raleigh, Cavite, P. I.

(Rec., 113.)

The report of this board covered all the property which had, up to that time, been appropriated to the use of the United States, whether captured afloat or ashore. In the absence of any authoritative decision under the statutes then in force as to whether property captured ashore was prize or not, the action of the captors, in including such property in their appraisement, was reasonable enough, and it is significant as showing their intention not to forego any of their rights. They appraised all the property which the United States had appropriated and in which they

claimed prize rights, whether all of their rights might be legally sustainable or not. They had no intention of letting the United States appropriate any property which even *might* be lawful prize, without taking all the steps requisite for the effective assertion of their own legal rights in such property, whatever those rights might be.

When the Government appropriated the *Don Juan* and the two *Islas*, however, the course of action was far different. The libellant issued no orders for a survey and appraisement under section 4624, and the Government's contractors removed the vessels (such removal being an undoubted act of appropriation) without any steps having been taken under that section whatever. This clearly indicates (especially in view of the course pursued as to the other property) that all parties considered at that time that these vessels were "destroyed," as the libellant had repeatedly (and as late as September 19, 1898) reported them to be, and that in having them removed the Government was merely dealing with property which already belonged to it, *jure republicæ*.

It has been stated above that the libellant contends that these three vessels are prize by virtue of sections 4615 and 4624, having been "appropriated for the use of the Government" as prizes "not in condition to be sent in for adjudication." As a matter of fact, not merely was the appropriation made without any reference to section 4624, but the vessels, when appropriated, were in condition to be sent in for adjudication. If

these vessels were appropriated as prizes at all, such appropriation could not have taken place until the vessels were raised and floated, for if the attempt to raise them had for any reason been abandoned they would have been "sunk or otherwise destroyed" and not prizes, as in the case of the *Cristobal Colon*. (*Sampson* v. *United States*, *supra*.) When, however, the vessels were raised and the appropriation as prize, if such it was, took place, the vessels were no longer "not in condition to be sent in for adjudication," as they were in condition to go to Hongkong, and could there have been repaired sufficiently to enable them to reach an American port. Hence, whether they were appropriated under section 4624 or not, they were certainly not appropriated under section 4615, and that section may be disregarded. The only question is, Were they prizes at the close of the battle, without regard to what took place afterwards?

In view of the present contention that the *Don Juan* and the two *Islas* were prizes, it is certainly most peculiar that until more than fourteen months after the battle of Manila Bay absolutely nothing seems to have been said or done by anyone to indicate a belief that such was the status of these vessels. On the contrary, until about that time everything that had been said or done in regard to them was precisely what would have been said or done if they had been "sunk or otherwise destroyed." Thus—

(*a*) The libellant himself burned these vessels, in order to prevent the Spaniards from making use of them.

(*b*) The libellant himself in his official reports repeatedly referred to these vessels as "destroyed," distinguishing them from others which he reported as "captured."

(*c*) The alleged captors asserted no rights in these vessels as captors until about July 13, 1899, long after hostilities had ceased, and long after the vessels themselves were in the possession of the Navy Department.

(*d*) After the close of the battle the alleged captors never at any time did anything themselves to any of these vessels to make it possible to treat them as prizes.

(*e*) The physical condition and situation of these vessels remained unchanged until after hostilities ceased.

(*f*) The Government did nothing to these vessels which it did not have a perfect right to do, without liability to account for the value of the vessels, if, as a matter of fact, they were not prizes.

(*g*) The alleged captors did not comply with the requirements of section 4615 in regard to the duties of captors of prizes "not in condition to be sent in for adjudication."

The understanding of the Navy Department.

The understanding of the Navy Department is also of some importance in this connection. The *Don Juan* and the two *Islas* were not raised and reconstructed as a matter of sentiment, but in order to provide useful fighting machines on reasonable terms. As regards the officers and men of the Navy, the retention of captured vessels may, as a matter of setiment and *esprit de corps*, be of great importance; but the Bureau of

Construction and Repair is a purely business Bureau, charged with very practical duties, and the defense of the nation and the safety of its naval officers and men demand that this Bureau should be ruled by practical considerations only, not by sentiment. It is in evidence that the authorities of the Navy Department took a purely practical view of the expediency of raising these very vessels, and "authority was given to raise and fit out these vessels if it could be done at a cost not exceeding 50 per cent of the cost of a new vessel of that kind," manifestly for the reason stated by Constructor Capps, viz: "that the type is an old one, and when raised and fitted out they would not be nearly as efficient as vessels designed at the present time would be." (Rec., 61.) It is perfectly clear that the Secretary of the Navy, in giving this authority, had no idea of paying prize money in addition, not merely because it was not worth while to spend more than 50 per cent on vessels of an old type, but also because if prize money was to be paid there would have been no motive in the restriction to 50 per cent, or in any restriction short of the total value of the vessel when raised, reconstructed and refitted; for whatever the excess of the value of the vessel when ready to be put in commission, over the cost of raising, etc., it would, if the vessel were a prize, have to be paid by the Navy Department, half to the captors and half to the navy pension fund. The greater the cost of raising, etc., the less would be the prize money, but the Department would have had to pay the total value

of the vessel just the same, whether the cost of raising, etc., were little or much. It would make no difference to the Department whether it paid 50 per cent for raising, reconstruction, etc., and 50 per cent as prize money, or whether it paid 100 per cent for work on the vessel and nothing as prize money. The fact that the Department did not authorize the raising and reconstruction of any vessels at a greater cost than 50 per cent of the cost of a new vessel of the kind is therefore conclusive evidence that the Secretary did not understand that there would be any claim for prize money, and his belief was obviously based upon the fact that these vessels were officially reported by the libellant as "destroyed," and were not claimed as even potential prizes.

The condition of the vessels and the work done upon them.

The condition of the vessels, all three of which were resting on the bottom and full of water, appears to have been as follows:

Isla de Cuba: Steel gunboat, 1,030 tons; forward end of main deck about 3 feet out of water and after end about 2 feet below water at low tide; upper works more or less damaged by fire.

Isla de Luzon: Steel gunboat, 1,030 tons; forward end of main deck about 1 foot below water and after end about 4 feet above water at low tide; upper works more or less damaged by fire.

Don Juan de Austria: Iron gunboat, 1,130 tons; forward end of main deck about 3 feet above water

and the after end about 3 feet below water at low tide; upper works badly damaged by fire. (Rec., 134.)

The vessels remained in this condition until October 29, 1898, when the Hongkong and Whampoa Dock Company, under a contract, began the work of raising them, which work was conducted as follows:

> Raising the *Isla de Cuba:* Vessel down by the stern, with main deck about 3 feet out of water forward, and about 2 feet under water aft. Soundings only 8 to 10 feet at low tide. Expedition arrived at Cavite October 29, and the same day began work on the *Isla de Cuba.* Divers were sent down to stop openings in hull. Bulwarks were built up with 12-inch planking so that the top would be above water at high tide. Three centrifugal pumps were mounted on board—a 6-inch forward over hatch under forecastle, a 10-inch amidships over engine-room hatch, and a 12-inch after, over wardroom hatch. Pumps were started November 3, steam being supplied by the tug *Este*, by permission of the commander in chief. Though pumping well down on the 4th, the vessel did not budge, apparently held by the suction of the mud. Soundings of 8 to 12 feet, with the water just above the main deck, showed the vessel to be deeply imbedded in the mud. With the assistance of divers, bamboo poles and planks were driven down along the ship's sides and worked to admit water beneath the vessel. Finally, at 2.30 p. m. on the 5th, the vessel lifted.
>
> Upon effort being made to haul the vessel out astern, she struck on the bank of her mud

bed after moving about 40 feet. The next day she was hauled out about 40 feet farther, cutting her way, as it were, with the rise and fall of tide. Finally, on the 7th of November, she was gotten completely off. On the 15th she was towed to the slip.

Raising the *Isla de Luzon:* Vessel down by the head, with main deck about 1 foot below water forward and 4 feet above water aft. Soundings, 12 to 15 feet. Carpenters were sent ahead from the *Isla de Cuba* on November 1, to start on the *Isla de Luzon*, and the 6 and 10 inch centrifugal pumps were shifted from the former to the latter on the 6th. When the *Isla de Cuba* was finally raised and clear, the wrecking force was concentrated on the *Isla de Luzon.* The work was interrupted, however, from the 9th till the 14th by a typhoon, during which, on the 12th, it was deemed advisable to flood the *Isla de Cuba* aft to sink her sufficiently to bear well on the bottom. The openings being closed, pumping out the *Isla de Luzon* began on the 15th, and the vessel floated at 3.30 p. m. of the same day, a duplex donkey pump having been installed over the ward-room hatch in addition to the two pumps, 6 and 10 inch centrifugal, referred to above. The stern, however, was held by the old wreck with which it was entangled, and not until the 19th was the vessel finally gotten clear, and the next day she was towed to the slip.

Raising the *Don Juan de Austria:* Vessel down by the stern with main deck about 3 feet above water forward and about 3 feet below water aft. Soundings, 14 to 15 feet.

> On the 1st of November several workmen were sent ahead to close the gangways and other openings. On the 22d the pumps were shifted from the *Isla de Cuba* and *Isla de Luzon*, the 6-inch being put forward, the 12-inch amidship, and the 10-inch aft. Started pumping early the 23d, and the vessel was afloat at 11.30 a. m. of the same day. She continued to make water, but the pumps kept it under control, and the next day she was towed to the slip. (Rec., 135–136.)

All the openings in the hulls were then closed, and the engines and boilers were cleaned and overhauled for the trip to Hongkong, for which port the *Isla de Cuba* and *Isla de Luzon* started on December 19, 1898, and the *Don Juan de Austria* on January 16, 1899. They arrived safely, and were then thoroughly reconstructed and refitted, the work being finished in the latter part of 1899. The cost of raising, taking to Hongkong, and reconstructing was about $304,000, very nearly half of the total estimated value of the vessels when again fit for service.

Bearing in mind the meaning which the words of section 4635 evidently had, as first used in the act of July 17, 1862, the recent decision in cases arising under this section, and the analogy suggested by the doctrine of constructive total loss, the conclusion would seem to follow that the *Don Juan* and the two *Islas* were, in consequence of the acts of the Spaniards and the libellant himself, "sunk or otherwise destroyed," within the meaning of section 4635. The

libellant's own acts are of some importance in this connection. Although prior to adjudication the rights of captors are inchoate only, and not absolute, yet the prize statutes evidently contemplate that these inchoate rights should begin at the time of the capture, and should exist without interruption from that time until adjudication is had. In the present case it is clear the *Don Juan de Austria*, *Isla de Cuba*, and *Isla de Luzon* were not held as prizes at the close of the battle, for all that the libellant then did was to set fire to these vessels and to destroy them by fire as far as he could, an act wholly at variance with any intention of holding them as prizes. Moreover, the fact that the libellant himself, as already shown, officially reported several times that these vessels were "destroyed," and distinguished them from "captured" vessels, and the further fact that he had an appraisal made of appropriated property which he claimed to have captured as prize, but not of these vessels, are, it is submitted, very good evidence that the words of section 4635, "sunk or otherwise destroyed," really mean, in naval usage, that the vessels can not be made to float by any means within the power of the naval force which has come into control of such vessels.

When the words "sunk or otherwise destroyed" were adopted by Congress in providing for naval bounty, they were presumably understood as having a recognized meaning among seafaring men, and there can be no higher authority than the libellant as to what that meaning is. When he officially reported

that the vessels in question were "destroyed," he knew precisely what he meant and what the Navy Department would understand him to mean, viz, that the vessels were not in a condition to be made prize, and that their destruction was such as would entitle the libellant and his naval force to bounty under section 4635. It does not now appear whether the libellant believed at the time that these vessels would utimately be raised by the Government and reconstructed for use in the Navy or not. If he did not believe it, though knowing, as of course he did, the intense desire of all patriotic naval officers to see in their own navy vessels which had once belonged to the enemy, then he must have considered these vessels as totally destroyed, and he could not have regarded them as prizes. If, on the other hand, he expected that as soon as possible every effort would be made to raise such of these "destroyed" vessels as were capable of being repaired and added to the United States Navy, then his reference to all the vessels which did not remain afloat as "sunk" or "destroyed" is even more forcible, as showing that those words were understood, in a somewhat technical sense, as meaning an actual but not necessarily perpetual condition. In either case, it is submitted, the libellant reported these vessels as "sunk" or "destroyed" because it was the most natural way of describing their condition, and any other naval officer, or even any other intelligent man, would have done the same, because all these vessels were actually "sunk or otherwise destroyed" at that

time, whatever became of them subsequently. The evidence, both of what was done and of what was reported, is, therefore, wholly on the side of that construction of section 4635 for which the United States now contends.

As a matter of fact, these three vessels were, in a very real sense, "sunk or otherwise destroyed" at the close of the engagement on May 1, 1898, and they remained so for six months thereafter. It can not be doubted but that if the libellant had within that period begun proceedings to recover bounty under section 4635 on account of these vessels, he would have been entitled to receive it. He and the force under his command were themselves utterly unable to raise the vessels, and as captors they had no right to contract with outside parties for the work of raising. The difference between these wrecks and the others was not one of kind, but merely of degree, in that it cost less to raise and repair them than it would have done in the case of the others, so that the Navy Department was willing to undertake the cost of the work. The mere fact that the Navy Department finally undertook this cost, and had the work done, can not have changed the legal status of these vessels or the legal rights of the libellant and his naval force from what they had been during the six months succeeding the engagement. The vessels were "sunk or otherwise destroyed" on May 1, 1898, and their status at that date fixes the libellant's rights.

The learned judge of the court below rejected this conclusion, however, saying:

> It is true that they were sunk and that efforts were made to destroy them by burning, but the burning was only partial, because the vessels were submerged, and the sinking was only temporary and not beyond recovery. That they were raised and repaired and are now in the service of the United States are facts that seem to prove that they were not destroyed but captured. (Rec., 150.)

The essential fact, in the eyes of the learned judge, was that these vessels were, as a matter of fact, raised; but that fact merely means that the United States chose to raise these vessels, and did not choose to raise the others. His view was that if the United States chooses to raise an enemy's sunken vessel of war, and succeeds in so doing, such vessel is not a sunken vessel within the meaning of section 4635. In other words, if the United States leaves a sunken vessel alone, she remains a sunken vessel within that section, but if it raises her she becomes, in consequence of being raised, a prize. The criterion, as between a capture under section 4615 and a sunken vessel under section 4635, is, under this view, simply whether the United States sees fit to raise the vessel or not. The court's view is not that the vessel is not sunken within the meaning of section 4635 if she can be raised and floated, nor is it that a vessel is not destroyed if any part of it remain, for the evidence in this case shows that every one of the vessels for

which this same libellant has recovered bounty under section 4635 could have been raised and repaired, some of them certainly for less than the cost of new vessels of their type. Naval Constructor Capps testified as follows:

> 41. Question. Did you make any inspection of the other Spanish vessels which were sunk in the same engagement?
>
> Answer. I did.
>
> 42. Question. Of all of them?
>
> Answer. Yes.
>
> 43. Question. Could any of them have been raised, in your opinion?
>
> Answer. Yes; several of them, but not with advantage.
>
> 44. Question. Which vessels could, in your opinion, have been raised?
>
> Answer. As a mechanical problem, all of them, without considering advantage or disadvantage.
>
> 45. Question. When you say they could not have been raised with advantage, do you mean that in every instance the cost of raising would have been greater than the value of the vessel when raised?
>
> Answer. I mean that the cost of raising and fitting out would have been too much to have justified fitting out that type of vessel. * * * It was known that the engines of the *Velasco* and *Don Antonio de Ulloa* were dismantled, the vessels themselves being at anchor. The *Castilla* was a wooden ship and a total wreck, and her magazines had also exploded. The *Reina Cristina* received the concentrated fire of the

fleet and suffered an unusual amount of damage; her hull was completely burned out fore and aft, and her magazines had exploded, besides having her engines disabled before the action was over. The small gunboats which were in the action suffered explosions of their magazines after being burned and partially sunk.

46. Question. The cost of raising and fitting out would have differed considerable with these different vessels, would it not?

Answer. Yes; not the three which were saved, but the others.

47. Question. As a general rule in such cases, what proportion should the cost of raising and fitting out bear to the value of the vessel when raised and fitted out to enable you to say that the undertaking was done with advantage?

Answer. It would be very hard to fix a general proportion, but the actual facts in this case were that recommendations were made to the Navy Department and that authority was given to raise and fit out these vessels if it could be done at a cost not exceeding 50 per cent of the cost of a new vessel of that kind.

48. Question. And no such recommendation was made in the case of the other vessels?

Answer. No; because it was believed that the cost of raising and fitting out would be nowhere near 50 per cent of the cost of a new vessel—would be very much in excess.

49. Question. Should you say that if the cost of raising and fitting out were 75 per cent of the cost of a new vessel it would be worth while to raise and fit out the sunken vessels?

Answer. Does this apply to other vessels or to those three vessels?

50. Question. My question refers to sunken vessels of whatever type, such as those which were sunk at Manila.

Answer. Generally speaking, I would by no means recommend the raising and fitting out of large numbers of vessels, if they were available, of the type found at Manila Bay, at a cost of 75 per cent of the cost of new vessels, because the type is an old one, and when raised and fitted out they would not be nearly as efficient as vessels designed at the present time would be.

51. Question. Leaving out of consideration the possibly antiquated type of some of these vessels, were there any of them which might in your opinion have been raised and fitted out for a cost of 75 per cent or less of their value?

Answer. I doubt it. Certainly not in the case of the *Cristina* or *Castilla*, and in the case of the *Ulloa* and *Velasco* it was definitely known that the machinery was dismantled and the boilers not in place.

52. Question. It is probable, though, is it not, that some of these vessels could have been raised and fitted out for less than the cost of a new vessel of that type?

Answer. Yes.

53. Question. It is practically certain that such could have been done?

Answer. Yes. (Rec., 60–61.)

In this connection it is to be observed that as late as July 25, 1899, Naval Constructor Hobson recom-

mended that the *Ulloa* and *Velasco* should be raised and repaired, or at least one of them. (Rec., 142.)

In view of this testimony it is clear that what the court below holds as the essential fact which shows that these vessels were captured as prize, and not "sunk or otherwise destroyed," is not that they were capable of being raised, a condition which existed at the close of the battle, but that they were actually raised, a condition which did not exist until six months afterwards. In other words, the court below holds that these vessels were captured as prize on May 1, 1898, because they were raised in November, 1898; but it is evident that until they were raised the captors could not have filed a libel against them, and that in the meantime bounty could have been recovered for them as "sunk or otherwise destroyed," so that until they were actually raised their status could not have been that of vessels captured as prize, but must have been that of vessels "sunk or otherwise destroyed." It is submitted that the statutes contemplate no such change of status.

Moreover, on the theory of the court below, the question of whether a vessel is a prize or a sunken vessel is not a legal question, to be determined by the status of the vessel at the close of the engagement, but purely one of administrative economy, to be settled by the Navy Department according to its views of what is the best policy. In 1898 the head of that Department decided (so the learned judge practically said) that if a vessel could be raised and refitted for

not over 50 per cent of the cost of a new vessel, it would be a prize under section 4615, but that if it would cost more than that, then the vessel would be a sunken vessel under section 4635. Another Department chief might have taken a different view, and some, at least, of the vessels now conceded to be sunken might have been prizes, or some of these alleged prizes might have remained sunken.

It is submitted that Congress intended that it, and not the Secretary of the Navy, should decide what should be prizes and what sunken vessels, and that the only way by which Congress, expressing its will in the statutes which it has enacted, can decide the matter is by considering the condition of the vessels at the close of the battle, whether the Secretary of the Navy may afterwards see fit to change that condition or not. If the matter be, as it should be, decided by the statutes, then the only practical criterion as to whether a vessel of war is the subject of prize proceedings or of bounty must be her capability of being at once sent to a prize court for adjudication. If she is afloat, or if, having run aground, she can readily be floated by her captors, she may be treated as a prize; but if she has sunk so that she can only be floated as the result of wrecking operations not contemplated by the prize statutes, and carried on by a third party, then, whatever may ultimately be done with her, she is the subject of bounty only, just as if she were irrevocably sunk or an absolutely valueless wreck.

Discussion of the construction adopted by the court below.

The court below treated section 4635 as if it read as follows:

> A bounty shall be paid by the United States for each person on board any ship or vessel of war belonging to the enemy at the commencement of an engagement, which is sunk or otherwise destroyed in such engagement by any ship or vessel belonging to the United States, unless the Secretary of the Navy shall at any time thereafter see fit to raise or reconstruct such enemy's vessel of war, in which case she shall be deemed and taken to have been captured as a prize.

There is not the slightest intimation in this section, as enacted, or in any of the sections under the title of prize, of any such qualification, or of any intention to allow the Secretary of the Navy any say whatever in the question of whether a vessel shall be a prize or not, or to make the determination of the status of the vessel as a prize or a sunken vessel in any way dependent upon the action of the Secretary of the Navy.

Unless the capacity of a vessel of war to remain afloat be the criterion as between prize and bounty, then the only possible criterion is her capability of being sold, for, under section 4615, if a captured vessel can not be sent to a prize court, the only prize money recoverable on account of her is from the proceeds of a sale of her, either to the Government on appraisement or to other parties. This, however, would be either a most unfair or a very uncertain criterion. If it were

possible to apply it rigidly in every case, then it would often operate unfairly, for as long as the vessel or what remained of it would sell for anything at all—no matter how little—then it would have to be sold for what it would bring, even though the proceeds might amount to very much less than the bounty money. It is in evidence that the other wrecks, for which a judgment for bounty has been entered in favor of the libellant and his officers and men, were advertised for sale, but that no bids were received, apparently because the United States had not a complete title to the territory. (Rec., 62.) On the theory of the court below, if political conditions had been more stable and the wrecks had sold for any sum at all—no matter how small—they would have been prizes under the concluding provision of section 4615, and the appellee would have been entitled to a share of the proceeds as prize money, instead of to the bounty. By the same theory if the Navy Department had decided (in deference to the traditional sentiment in favor of retaining captured vessels of war in the navy of the captor nation) to raise and repair some of the other wrecks, and the cost had equaled the total value of a new vessel, then the prize fund on account of such vessel would be nothing at all and the captors would be entitled to no bounty. Congress could never have intended such a result, and yet it is perfectly possible if the question of prize or bounty be left to be decided by the policy of the Navy Department and not by the statutes themselves. What Congress intended was that as the capture or sinking

of vessels of war was a matter of great importance there should always be a substantial bounty for such vessels, if prize money could not be recovered; and to this end it provided that when such a vessel was no longer afloat, bounty should be paid.

The court below has said that the bounty provided for by section 4635 "was not intended to be paid for mere temporary disablement that could be readily remedied." (Rec., 150.) That is true, but a vessel which requires (as all three of these vessels did) raising, reconstruction, and refitting, at a cost of very nearly half her value, when again ready for service, the work upon her taking a year or more to complete, can not be described as suffering from "mere temporary disablement that could be readily remedied." Apparently the court was impressed by Mr. Capps's statement that "the wrecking outfit consisted only of pumps, and the ordinary materials that you can get in any first-class ship chandler's establishment, and men. * * * Of the four pumps one was a 12-inch, two were 9-inch, and one 6-inch. The barges and derricks and apparatus of that kind were supplied from the resources of the navy-yard." (Rec., 59.) There is no evidence as to just what a "first-class ship chandler's establishment" is, but at all events the resources of the libellant's naval force did not include such an establishment. Moreover, the witness's statement does not seem to include the pumps as among the articles which could be got at a "first-class ship chandler's establishment," though the court below has evidently understood the

statement as putting both the pumps and the materials in the same category. The learned judge says, "The necessary pumps and ordinary materials to be found in any first-class ship chandler's establishment were not to be obtained at Manila Bay;" but the witness distinguished between the pumps and the "ordinary outfit of material in the way of oakum, felt, small tools, etc.," the latter being what he had previously referred to as the ordinary materials that you can get in any first-class ship chandler's establishment. At all events, it was necessary to get an outside party, the Hongkong and Whampoa Dock Company, to do the work of raising these ships, bringing them to Hongkong, and reconstructing them there; and if such outside resources had not been available the vessels would presumably have remained lying on the bottom until they had become no longer worth raising.

The only possible cause of difference between the status of the *Don Juan* and the two *Islas* and that of the *Ulloa*, *Velasco*, and other vessels for whose destruction bounty has been adjudged is that the former were raised and the latter were not. The latter were captured from the Spaniards just as completely as were the *Manila*, *Callao*, and other vessels that remained afloat. The mere fact that the *Ulloa*, *Velasco*, and others were wrecks did not make them any the less captures, for all control over them had passed from Spain to the United States, and the United States was entitled *jure reipublicæ* to deal with them as it might see fit. It has already been pointed out that where a

vessel is raised by a third party (in this case a foreign corporation) such raising can not make the vessel a prize or even help to make it such, because no vessel can be made a prize except by the unaided act of a naval force. (*The Siren*, 13 Wall., 389.) It has also been already pointed out that the appropriation of a captured vessel by the United States can not make it a prize, and *a fortiori* that the raising and appropriation of a vessel after hostilities cease can have no effect upon its status.

The raising and appropriation of these vessels not having changed their status as regards the libelant's rights, those rights must remain what they were at the time they came into existence, i. e., as soon as the vessels had been sunk and burnt. These vessels, like the *Ulloa*, *Velasco*, and others, being "sunk or otherwise destroyed," were simply property captured from the enemy, but not prize. They were in the same status as vessels captured by a conjoint military and naval expedition. The Government was entitled to the exclusive possession of them, and it took advantage of this right. It did not appropriate them under section 4624, but appropriated them *jure reipublicæ*. The libellant and his officers and men are entitled to a judgment in the Court of Claims for bounty on account of these vessels, but not to prize money.

The court below made, however, the following suggestion:

> Suppose that this historic battle had not resulted in more than the overwhelming of the

> Spanish fleet; that Cavite had remained in the possession of Spain, and that Spain had raised these vessels and restored them to her navy; could it be contended that they had been "sunk or otherwise destroyed" by the fleet under Admiral Dewey, and that he, his officers and men were entitled to bounty? (Rec., 150.)

This suggestion wholly overlooks the fact, already stated, that war is intended to be destructive, but not predatory. The loss to the enemy's fighting force is the same when a hostile vessel of war can no longer float as when a prize crew takes her to port for adjudication. In the present case the vessels were half destroyed, as far as concerns money value, for the cost of raising, reconstructing (the word "reconstruction" is used in Hobson's official report, Rec., 132), and refitting was just about half the total value of the vessels when again ready for service, but for the purposes of the war the fighting force of the enemy was reduced to the extent of these vessels just as completely as if they had been annihilated. They had ceased to be available for any purposes of warfare. It is true that if Manila Bay had not remained in the control of the United States these vessels might conceivably have been raised, reconstructed, and refitted by Spain; but this could not have been done during the period of the war, so that, for the purposes of the war, the injury to the enemy's fighting force would have been the same whether these vessels had afterwards been raised and reconstructed by Spain, or by the United States, or not at all.

The court below also called attention to the fact that in the appraisements by the Bureau of Supplies and Accounts, made November 1, 1899 (Rec., 129), these vessels are all referred to as captured Spanish vessels. As these appraisements were not made until after the present suit had been brought, it is hard to see how they can be relevant; but even if they were they do not state that these vessels were captured as prizes, but only that they were "captured," a statement which would have been equally true of the *Ulloa*, *Castilla*, or any of the other wrecks which were not raised.

It must be admitted that the case of *United States* v. *The Ram Albemarle* in the Supreme Court of the Dis- of Columbia (No. 146, Dist. Ct.) is against the view above set forth, to this extent, that a libel was filed against the *Albemarle* for the benefit of the captors, though she had been sunk on October 27, 1864, and had afterwards been raised. As the district attorney had assumed that the act of 1864 made such a vessel prize, the captors were, of course, only too glad to acquiesce in his view, the prize money coming to more than the bounty would have done, and so, all parties being agreed, the issue as to whether such a vessel was a prize or the subject of bounty was never raised, never tried, and never determined. The case of *United States* v. *Steever* (113 U. S., 747) was not brought under the general provisions of the prize statutes, but under a special jurisdictional act in which Congress had seen fit to treat the *Albemarle* as a prize, and the decision

did not relate to the status of the vessel, but to other matters connected with the claims for prize money.

In *Dewey* v. *United States* (178 U. S. 510), there was an analogous adverse precedent, stronger than that of the *Albemarle*, yet this court disregarded it. The issue was whether the word "force," under section 4635, Revised Statutes, meant an exclusively naval force or a naval force supported by land batteries. In *United States* v. *Farragut* (22 Wall., 406) the arbitrators had awarded prize money, under what is now section 4630, on the theory that the word "force" included land batteries, and although an appeal was taken it was voluntarily dismissed, as to the items affected by this ruling, before the argument, so that this court never passed on the point. When the point finally came before this court it had no difficulty in deciding that "force" meant naval force alone, in spite of the fact that a considerable sum had been paid to Admiral Farragut and his officers and crew on the other theory.

In view of the way in which this court treated the so-called precedent of the Farragut case, it is submitted that the *Albemarle* case should not be considered as in any sense a precedent. The truth is that the exploit of Cushing, like that of Farragut, meant so much in the prosecution of the civil war, and was regarded with such admiration, that no district attorney would ever have thought of weighing the words of statutes when there was an opportunity to reward those who had defended the nation when its life was at stake. Natural as that feeling was, it necessarily tended to prevent that close inquiry into the precise legal rights

of the parties, without which no judgment of a court can be of real value as a precedent. Moreover, it must not be forgotten that the *Albemarle* was raised in March, 1865, and reached Norfolk on April 27, 1865 (Naval Reb. Rec., ser. 1, vol. 12, pp. 9, 22, 75, 109, 128), while the civil war was still going on and while prize rights could still come into existence; whereas in the present case the three sunken vessels were not raised and appropriated until hostilities had ceased. This of itself constitutes a distinction between the cases.

2.

STATUS OF PROPERTY TAKEN FROM VESSELS SUNK OR OTHERWISE DESTROYED.

[See second assignment of error.]

As already stated, the record shows that some of the property libeled was taken from the three Spanish vessels which were raised and reconstructed, and from the vessels which were, indisputably, "sunk or otherwise destroyed." The money value of such property was undoubtedly much less than that of similar property libeled in the Sampson case, but, for the sake of uniformity and convenience, the whole argument on the law of the subject will be made in the present brief. The position of the Government is that the legal status of such property is the same as that of the vessel to which it belonged.

Section 4635, Revised Statutes, provides that "a bounty shall be paid by the United States for each person on board any ship or vessel of war belonging to an enemy at the commencement of an engagement,

which is sunk or otherwise destroyed in such engagement by any ship or vessel belonging to the United States." This grant of bounty is obviously "intended as a substitute for the prize itself" (*The Selma*, 1 Low., 30, 32), and is given "in lieu of" prize money (*Porter* v. *United States*, 106 U. S., 607.)

It would seem to be clear enough that bounty and prize money can not both be obtained on account of the same "ship or vessel of war," that such ship or vessel can not be both a "prize" under sections 4615–4634, and also "sunk or otherwise destroyed" under section 4635; and hence that the only possible question would be as to what constitutes a "ship or vessel of war" within the meaning of section 4635, i. e., whether that section relates only to the hull of the vessel, or relates also to whatever may be affixed to or on board of the vessel for the purposes for which it is used as a vessel of war.

It is submitted that except where a statute or other writing makes a plain distinction between the hull of a ship and the various articles which may be attached thereto or contained therein for the purposes for which the ship is employed, these latter articles are always understood as included in the term "ship" or "vessel.' Thus where Lord Stowell defined prize as "ships and cargoes taken by ships" (*Genoa and its Dependencies*, 2 Dods., 444) the term "ships" obviously included their whole equipment and outfit, everything attached to or on board of them which could not properly be described as cargo, for the equipment and outfit of a ship are

unquestionably prize, and Lord Stowell's definition was intended to be comprehensive.

The reason why Lord Stowell was content with so brief a definition of the two kinds of prize property as "ships" and "cargoes" was evidently because it had long been recognized that the term "ship," as used in courts of admiralty, included the tackle, sails, apparel, furniture, boats, and other appurtenances—everything in fact on or about a ship which could not be considered as cargo.

It is true that admiralty practice has never been wholly free from the verbosity and prolixity of expression which were formerly a marked characteristic of all legal proceedings, and still characterize them to some extent; and it is not surprising that those who drew up libels, writs, and other documents in regard to ships have rarely been content with using the single word "ship" or "steamship," but have usually superadded the expressions "tackle, apparel, and furniture," "engines, boilers, and machinery," and other like phrases. Such phrases, however, are, it is submitted, really superfluous. No reported case can be found in which it has been held that a libel against a ship, or a statute in regard to proceedings against ships, did not include in the term "ship" everything in or upon the ship which belonged to the owner and was necessary to the purpose for which she was employed. On the contrary, the authorities all indicate an inclusive, all-embracing use of the terms "ship" or "vessel."

The statute of 6 Anne, c. 37, reads as follows:

> SEC. 2. * * * That the flag officers, commanders, and other officers and seamen of every such ship or vessel of war shall have the sole interest and property of and in all and every ship, vessel, goods, and merchandize they shall take in any part of America. * * *
>
> SEC. 3. * * * letters of marque * * * for the attacking, surprising, seizing, and taking by and with such ship or vessel, any ship or vessel, goods, ammunition, arms, stores of war, or merchandizes belonging to or possessed by any of Her Majesty's enemies in America, * * * and that such ship or ships, vessel and vessels, arms, ammunition, stores of war, goods, and merchandizes whatsoever, with all their furniture, tackle, or apparel so to be taken. * * *

The act of 13 Geo. II, c. 4, uses the same language. In these statutes it is clear that precisely the same kinds of property, and all of them, are intended to be covered by the words used in each instance; i. e., that section 2 secures to the captors the property in the tackle, apparel, and furniture, and the arms, ammunitions, and stores of war, of the ships or vessels taken, just as much as if those articles had been specifically named, while the two descriptions of prize property in section 3, though not identical in words, are intended to have precisely the same scope.

The statute of 13 Geo. II, c. 4, sec. 19, reads as follows:

> * * * That in case any ship or vessel, or any goods or merchandizes shall be taken by

> any privateer, through consent or clandestinely, or by collusion or connivance, such ship and vessel and such goods and merchandizes, and also the ship's tackle, apparel, furniture, and ammunition of such privateer shall * * * be declared and judged good prize to His Majesty. * * *

In this section the tackle, apparel, furniture, and ammunition of the offending privateersman's vessel were separately mentioned, because they were to be condemned, although the vessel was not; but neither the tackle, apparel, and furniture, nor the arms and ammunition of the captured vessel were specifically mentioned, although they were indisputably prize, it being realized that as they were practically a part of the captured vessel they would of course be dealt with in the same way. In the one case there was a reason for distinguishing between the vessel and its tackle, apparel, furniture, and ammunition, but in the other case there was not.

The statute of 16 Geo. III, c. 5, reads as follows:

> Sec. 5. And for the more speedy proceeding to condemnation or other determination of any prize, ship, or vessel, goods or merchandizes, to be taken as aforesaid, * * * and in case no claim of such capture, ship, vessel, or goods shall be duly entered or made in the usual form, * * * or if there be such claim and the claimant or claimants shall not within five days give sufficient security (to be approved by such court of admiralty) to pay double costs to the captor or captors of such ship, vessel, or goods,

in case the same so claimed shall be adjudged lawful prize * * * but in case * * * it shall appear doubtful whether such capture be lawful prize or not * * * that then the said judge or judges shall forthwith cause said capture to be appraised, * * * for which purpose the said judge or judges shall cause the goods found on board to be unladen * * * and shall also proceed to take good and sufficient security from the captors to pay such costs as the court shall think proper, in case such ship shall not be condemned as lawful prize. * * *

SEC. 17. * * * That appraisements and sales of any ship or ships, goods, wares, or merchandizes shall be made by agents. * * *

SEC. 37. * * * That nothing in this act shall extend to any ship or vessel, or the cargo thereof, which shall have been or may be cleared out from any port in Great Britain or Ireland before * * * .

In these sections, as in many others of the same act, there is no mention of tackle, apparel, and furniture, nor of anything except ships and cargoes, the latter being usually described as "goods and merchandizes," and yet it is perfectly evident that every mention of a "ship" or a "vessel" included the tackle, apparel, furniture, stores, and armament of such ship or vessel, all of which tackle, apparel, etc., became prize in consequence of the capture of the vessel to which it appertained. After the adoption of the Constitution of the United States the first act to regulate prize was that of March 2, 1799 (1 Stats., 709–715), providing as follows:

SEC. 5. *And be it further enacted*, That all captured national ships or vessels of war shall be the property of the United States—all other ships or vessels, being of superior force to the vessel making the capture, in men or guns, shall be the sole property of the captors—and all ships or vessels of inferior force shall be divided equally between the United States and the officers and men of the vessels making the capture.

SEC. 6. * * *

13. The bounty given by the United States on any national ship of war taken from the enemy and brought into port shall be, for every cannon mounted carrying a ball of twenty-four pounds or upward, two hundred dollars. * * *

It can not be doubted that these sections meant that the tackle, sails, apparel, furniture, stores, boats, guns, ammunition, and other appurtenances of captured national ships or vessels of war should be the property of the United States, as well as the ships themselves, and that in regard to all other "ships or vessels" the words were used in the same comprehensive sense.

The question as to what property should be regarded as practically part of the ship itself has also arisen in other classes of cases besides that of prize. The statute of 53 Geo. III, c. 159, to limit the responsibility of shipowners, provided in the first section that an owner should not be liable for damage done to the cargo, without his own fault, "further than the value of his or their ship or vessel, and the freight due or to grow due." In other sections the word "appurtenances" was used as well as "ship or vessel." In *The Dundee*

(1 Hagg., 109, 122) the question arose whether, in determining the measure of the owner's liability, the value of certain fishing stores should be included in the value of the ship. Lord Stowell held that it should, saying:

> A cargo can not be considered as the appurtenances of the ship, being that which is intended to be disposed of at the foreign port for money or money's worth vested in a return cargo. Its connection with the ship is merely temporary, and it bears a distinct character of its own. But those accompaniments that are essential in its present occupation not being cargo, but totally distinct from cargo, though they are not direct constituents of the ship (if indeed they were they would not be appurtenances, for the very nature of an appurtenance is that it is one thing which belongs to another thing), yet if they are indispensable instruments, without which the ship can not execute its mission and perform its functions, it may, in ordinary loose application, be included under the term ship, being that which may be essential to it, as essential as any part of its own immediate machinery.

The owner of the *Dundee* subsequently declared in prohibition in the King's bench, where the court reached the same conclusion as had Lord Stowell. Lord Tenderden (then Abbott, C. J.,) said:

> In this [first] section the word "ship" only is used, but in the following sections the phrase "value of the ship and her appurtenances" occurs not less than ten times. The same

phrase occurs in the first section of the 7 G. 2, c. 15, and of the 26 G. 3, c. 86. The three acts are all *in pari materia*, and there can be no doubt that the first section of the act on which this question arises, is to be understood as if the words "with all her appurtenances" were used therein, supposing those words would make any difference in the sense.

* * * * *

The fishing stores were not carried on board the ship as merchandise, but for the accomplishment of the objects of the voyage; and we think that whatever is on board a ship for the object of the voyage and adventure on which she is engaged, belonging to the owners, *constitutes a part of the ship and her appurtenances* within the meaning of this act, whether the object be warfare, the conveyance of passengers, or goods, or fishery.

This construction furnishes a plain and intelligible general rule; whereas if it should be held that nothing is to be considered *as part of the ship* that is not necessary for her navigation or motion on the water, a door would be opened to many nice questions and much discussion and cavil. (*Gale* v. *Laurie*, 5 Barn. & Cress., 156).

It is noteworthy that Lord Tenterden took it as a matter of course that whatever was necessary for the navigation or motion of a ship on the water was "part of the ship," and that the only questions which could possibly arise (questions which his decision sought to prevent from arising) would concern property on

board the ship for the purposes of the particular voyage on which she was engaged.

In *Hall* v. *Ocean Ins. Co.* (21 Pick., Mass., 472) the court considered a boat "as a part of the ship," as between assurer and assured, because it was a necessary part of the ship's furniture.

These various instances of a comprehensive use of the term "ship" or "vessel" serve to make clear the meaning of Rule VIII of the Rules of Practice for the Courts of Admiralty, framed by this court in pursuance of the act of August 22, 1842, chapter 188, which rule provided as follows:

> In all suits in rem against a ship, her tackle, sails, apparel, furniture, boats, or other appurtenances, if such tackle, sails, apparel, furniture, boats, or other appurtenances are in the possession or custody of any third person, the the court may, after a due monition to such third person, and a hearing of the cause, if any, why the same should not be delivered over, award and decree that the same be delivered into the custody of the marshal or other proper officer, if upon the hearing the same is required by law and justice.

This rule certainly does not mean that each of the several classes of things above mentioned must be separately mentioned in the libel in order to be covered by it (that if the word "sails," for instance, were omitted, the libel would not cover the sails, though it covered everything else), but rather that if in a suit in rem against a ship, including her tackle, sails, apparel,

etc., whether they are specifically mentioned or not, it appear that any article properly belonging to the vessel has been removed from it, the court may decree its delivery to the marshal. The following cases illustrate the application of the rule:

> The voyage contemplated by the vessel, and for which supplies were furnished, was a pearl-fishing voyage. As part of her necessary equipment for this enterprise she was provided with a diving bell, air pipes, and other apparatus not required for use as a "navigating ship," but indispensable for the accomplishment of the objects of the particular voyage she was about to enter upon. * * *
>
> The previous enumeration of "tackle, sails, apparel, furniture, and boats" included everything belonging to the vessel as a "navigating ship." Unless the word "appurtenances" applies to other objects on board belonging to the owners for the purposes of the voyage it can have no operation. The word was, no doubt, used advisedly by the Supreme Court. * * *
>
> I think, therefore, that the lien in this case extends to all the articles belonging to the owner which (not being cargo) have been placed on board for the objects and purposes of the voyage and enterprise in which she was about to embark. (*The Witch Queen*, 3 Sawy., 201.)

It was held accordingly that the parties who had furnished material and supplies for the vessel had a lien upon the pearl-fishing apparatus as well as upon the rest of the outfit and the vessel itself.

> The wrecking apparatus seized by the marshal was a part of the ship, her tackle, apparel, and furniture, by means of its immediate and indispensable connection therewith, in the particular occupation to which was destined and in which she was engaged, and as such was responsible justly with the rest of the ship tackle, apparel, and furniture, for the payment of seamen's wages and supplies. (*The Edwin Post*, 11 Fed., 602.)

Since the general substitution of steam for sails, the words "boilers, engines, and machinery" have usually been added to the other descriptive words given in Rule VIII, but they are not essential.

It is therefore submitted that the words "ship or vessel of war belonging to an enemy," in section 4635, were used in the same comprehensive sense that had marked their use in several previous statutes, both English and American, and that the intention was to give bounty for the sinking or destruction of the ship as a whole, including its tackle, apparel, furniture, boilers, engines, machinery, boats, and other appurtenances. This bounty, as has already been shown, was given when vessels of war, as distinguished from merchant vessels, were sunk or otherwise destroyed, and it was given on account of the injury inflicted upon the enemy's fighting force. It was given "in lieu of" prize money (*Porter* v. *United States*, 106 U. S., 607; *The Selma*, 1 Low, 30), and there is no suggestion in these cases that the bounty was given as a substitute for only a part of the prize money. It was not

intended that any part of the material of the vessel or of its tackle, apparel, furniture, boilers, engines, machinery, boats, or other appurtenances, should, if recovered, be the subject of condemnation in prize for the benefit of the captors. On the contrary, it is perfectly evident that what was meant was that the bounty should be a substitute for all prize money, and that if the condition of an enemy's vessel of war is such that the naval force which has reduced it to that condition is entitled to bounty, then it is not entitled to any prize money whatever, either for any portion of the vessel or for any property recovered from it. All such property belongs to the Government, *jure reipublicæ*. (See *The Siren*, 13 Wall., 389.)

The most valuable appurtenances recovered from the wrecks were the guns, but they and all the other apparel or appurtenances were equally a part of the vessel. The guns of a vessel, its compasses, its search lights, its boats, are just as essential to the vessel as its decks, or cabins, or machinery. In point of fact, the guns are attached to the vessel as permanently as the machinery itself, and the same is true of many other articles which were taken from these vessels. The proper test, however, is not whether any particular piece of property is physically attached to the vessel, but whether it belongs to the vessel; i. e., whether it is to be used in connection with those purposes for which the vessel itself as a vessel of war exists. To take the most extreme case, supplies of food on board a vessel of war, intended for the use of the crew, or

money intended for the payment of the crew, must, it is submitted, be regarded as appurtenances. They are simply part of the necessary outfit of the vessel, without which its utility as a vessel of war would be as short as if it were deprived of its engines or propeller.

In many cases growing out of the Spanish war vessels alone were condemned and their cargoes restored, while in others the vessels were restored and the cargoes condemned. No case of the former character can, however, be found in which the boats, engines, boilers, tackle, apparel, furniture, stores, equipment, etc., were not sold as part of the vessel; nor a single case of the latter character in which the United States, in restoring the vessel, presumed to strip her of her tackle, apparel, furniture, sea stores, etc., as not belonging to the same category as the vessel itself.

The practice in regard to libels and orders of sale in prize cases is not uniform as regards the extent to which a vessel's outfit is referred to. A very full description is "the ——, her boats, engines, boilers, tackle, apparel, furniture and equipment." A less full but equally good description, covering precisely the same property, is "the ——, her tackle, apparel, and furniture." A still more concise but equally comprehensive description is "the ship ——," or "the steamship ——." None of these descriptions would include cargo, and all of them would include everything upon the vessel except the cargo and the personal effects of the officers, crew, and passengers. It was in this inclusive sense,

it is submitted, that the words "any ship or vessel of war belonging to an enemy" were used in section 4635 of the Revised Statutes.

The Comptroller of the Treasury, in a case which recently came before him, held that money taken from a Spanish vessel of war which had been "sunk or otherwise destroyed" was not to be treated as prize-money. (5 Comp. Dec., 452.)

In the brief of the Messrs. King in *United States* v. *Sampson*, and perhaps also in their brief in the present case, occurs the following significant statement:

> Bounty is granted, as we have seen, where the gallantry and success were both as great [as in cases of capture], but where no *res* resulted from which any reward could have been obtained.[a]

In view of the fact that bounty has been granted in cases where a great deal of the vessel remained, which could apparently have been sold for something, even if comparatively little, the words "no *res* from which any reward could have been obtained" presumably refer to the legal status of the *res* rather than to its physical existence. Be this as it may, however, the significant fact is that the counsel who contend that bounty may be granted for the destruction of a vessel, and also prize money for so much of the outfit as can be recovered, say, in the same breath, that the circumstance which calls for bounty is that "no *res* resulted

[a] This quotation is taken from a draft of the brief, seen prior to printing by courtesy of the Messrs. King.

from which any reward could have been obtained." According to them, their clients have recovered bounty in the Court of Claims for the destruction of the *Reina Cristina*, *Castilla*, and other vessels on the ground that, in consequence of their destruction, "no *res* resulted from which any reward could have been obtained," but are entitled to insist in a district court that a *res*, viz, the equipment of the vessels, did result, and that they should obtain a reward from it in the form of prize money. Greater inconsistency is scarcely conceivable.

The learned judge of the court below seems to have conceded that bounty was a substitute, though not an equivalent, for all prize money that might be recovered on account of the structure of the ship itself, but he held that the "outfit and appliances" were prize, even where bounty was paid for destruction of the vessel. He said:

> The reward is apparently bestowed for the injury done to the enemy in the loss of fighting power; it matters not how valuable may be the appliances and outfit that go down with her or that are involved in her destruction. * * * I find nothing in the statute to prohibit the condemnation in prize of property captured or taken from ships sunk or destroyed in addition to bounty paid for the destruction of the ship. (Rec., 158.)

Here a distinction is manifestly attempted to be drawn between the ship itself (i. e., apparently, the hull) and the "appliances and outfit," which words

seem to have been intended to include everything except the hull of the ship.

No authority was cited in support of this view, even by way of analogy, and it is wholly at variance with the long line of authority in statutes and decisions cited above, to the effect that the word "ship" includes everything in the way of "appliances and outfit," unless some clear distinction is made between them. Two reasons were, however, advanced for holding that an enemy's vessel of war may be the subject of bounty on account of its destruction, and also of prize money on account of property taken from it, the first reason being that the bounty alone would be an inadequate reward. In view of the fact that bounty has been judicially stated to be "a substitute for the prize itself," this reason seems rather extraordinary. It is probably true, as the learned judge suggested, that "the original idea was that the amount so ascertained [i. e., by the number of persons on board the enemy's vessel] would be a fair substitute for the prize itself, and such idea may not have been far wrong in the days of wooden vessels of war," but it comes perilously near judicial legislation to hold that both bounty and prize money may be recovered, on account of the same vessel, merely because "in these days of steel-armored cruisers and battle ships, with all their expensive appliances, the highest amount of bounty allowed is very inconsiderable compared with the value of the ship sunk or destroyed." The words of the bounty section (R. S., 4635) are the same as they were when the section was

first enacted in July, 1862, when the navies of the world were still composed of wooden vessels. The battle between the *Monitor* and the *Merrimac* had occurred only four months before (March 9, 1862), and while it may have been realized that a change in the construction of vessels of war would have to be made, Congress could not possibly have foreseen the recent developments in naval architecture, or even have anticipated that there would be any very serious increase in the cost of vessels. When the act of July 17, 1862, was passed, the bounty would have been, and was presumably intended to be, a fair substitute for the prize itself, and as the same bounty provision which is found in that act was reenacted in 1864 and incorporated into the Revised Statutes in 1872 without any change of language, it must have been intended that the scope and effect of the section, as reenacted, should be the same that it had been previously.

The other reason advanced by the court below was that "if the vessel were captured the cargo or outfit and appliances would enter into the estimate of the total value." As no one denies that if an enemy's vessel of war had a cargo aboard (a most unlikely circumstance nowadays), when sunk or otherwise destroyed in action, the cargo, if recovered, would be prize, the words above quoted can only mean that the "outfit and appliances" are a species of cargo, as the libellant's counsel actually contend. The distinction between the cargo and the ship has already been referred to, and it is submitted that nothing in the way of the outfit or equipment of a ship can possibly be regarded as

cargo, since, although such outfit and equipment are to some extent movable, they are placed in the vessel with the idea that they shall remain there until they are used up or worn out. Some of the "outfit and appliances," such as engines, boilers, gun mounts, etc., are physically attached to the ship, so as to be only removable with considerable difficulty.

A cargo may be a prize entirely separate from the vessel in which it is carried, and the reason for this is that the cargo has nothing to do with the vessel any more than a passenger has to do with it. Contraband of war in a neutral vessel is prize, though the vessel is not; neutral goods in an enemy's vessel are free, though the vessel is condemned. If an enemy's vessel carrying neutral goods is captured, the neutral goods alone are free, and every part of the outfit and equipment of the vessel is prize. Similarly, if a neutral vessel carrying contraband of war is arrested, the contraband cargo will be prize, but not any part of the outfit or equipment of the vessel.

It is true that if the outfit and equipment of a vessel were thrown overboard in a storm on the way to the prize court, this would not prevent the vessel from being condemned any more than if the cargo had been thrown overboard, but the vessel, as a prize distinct from her cargo, would be worth just so much less by loss of her equipment and outfit; whereas, were the cargo lost the value of the vessel itself as a prize would remain the same. Were the equipment and outfit unloaded, and the vessel burned at the wharf and thus

lost, this would not prevent such equipment and outfit from being prize, if the vessel was a prize; but they would be prize simply because the vessel to which they had belonged had been a prize, and the burning of that could not make them any less a prize. It is true that prize money may be adjudged for either vessel or cargo separately or for both together, but it would be something wholly new in prize law for prize money to be adjudged for the equipment and outfit of a vessel when the vessel had never been and was not entitled to be a prize.

> The cargo of a vessel is the lading of a ship or vessel; the merchandise or wares contained in a ship or vessel. (*The Governor Cushman*, 1 Abb., 14; 1 Biss., 490; 10 Fed. Cas., 888).

The distinction between cargo and outfit or supplies was considered at some length in a Massachusetts case, where the court said:

> In respect to the cargo, it appears that the property on board the *Henry* consisted partly of mules, and of hay, corn, etc., which were put on board for their subsistence on the voyage from St. Jago to Charleston. And it is contended that the hay, corn, etc., were protected by this policy under the name of cargo. We think, however, that they are more analogous to outfits than to cargo. The value of this provender was to be compensated for in the price of the mules in the market, as in the whale fishery the value of the outfits is to be made up by the proceeds of the oil. It has been argued that there was an expectation that a considerable quantity of the

hay and other provender would remain unconsumed if the vessel should have an ordinarily good passage, and would be sold as cargo at the port of discharge. But this food for the cattle was not taken on board as merchandise, and the circumstance that some of it might remain to be sold at the end of the voyage does not make it cargo any more than the remnants of fishing lines, harpoons, etc., in the whale fishery would make the outfits to become cargo within the common meaning and understanding of merchants and underwriters.

Then it is to be considered whether mules can be viewed as cargo. According to Postlethwaite, cargo signifies "all the merchandises and effects which are laden on board a ship, exclusive of the soldiers, crew, rigging, ammunition, provisions, guns, etc., though all these things load it sometimes more than merchandises." In that enlarged sense the mules might be considered as cargo, and there should seem to be no distinction whether they were on or under deck. * * *

There were, however, 10 doubloons on board, which we think may be considered as within the word cargo. * * * There is no evidence that this money was intended for the expenses of the captain, and not as cargo to be laid out at the port of discharge, as dollars carried to India are to be invested for the use of the owners. (*Wolcott* v. *Eagle Ins. Co.*, 4 Pick., 429, 433.)

This last statement clearly indicates that even money is not cargo unless it is intended for commercial use

in the same sense in which cargo is so intended. Money that is to be used for seamen's wages or to purchase supplies, on a vessel of war, is a part of the outfit of such vessel, and must share its status if "sunk or otherwise destroyed."

The reasons given by the court below for holding that the outfit and appliances of an enemy's vessel of war, which is sunk or otherwise destroyed in action, are prize, would apply equally well to any part of the structure of the vessel itself which might be recovered. Indeed, the logical conclusion to be drawn from the reasoning of the court below is that if every part of such a vessel were recovered piecemeal, the fact that bounty had been paid for the destruction of the vessel would not prevent all the separate parts of the vessel so recovered from being prize property. The effect of the decision is to negative what was said in *Porter* v. *United States* and *The Selma*, and to hold that bounty is not "a substitute for the prize itself," except to the extent that the vessel as an entirety can not be sent in as prize, though all its separate parts may be. It is submitted that what was said in *Porter* v. *United States* and *The Selma* was said advisedly, and that the bounty is a complete substitute for prize rights not merely in the ship itself, as a vessel, but in all property recovered which appertained to the ship, whether as a part of its structure or as a part of its outfit or equipment.

QUESTIONS RAISED BY THE CROSS APPEAL OF ADMIRAL DEWEY.

1.

STATUS OF PROPERTY TAKEN ON LAND.

The second section of the libel in this case asserts that the squadron under the libellant's command captured from the King of Spain, among other things, certain property, consisting of anchors, anchor gear and chains, electric apparatus and materials, etc., without stating whether this property was captured on vessels belonging to the King of Spain or on land, but it appears from the evidence that the larger portion of it was taken from the naval arsenal at Cavite. The same section of the libel also avers the capture of "certain guns, ammunition, ship's supplies, and supplies of various kinds from the arsenal at Cavite, and from the shore batteries defending the harbor and city of Manila." The court below held that no property taken on land could be subject to adjudication as prize, and dismissed the libel as to all such property. On account of this decision, the libellant has taken a cross appeal.

In attempting to make the libel in this case cover property taken on land, the libellant has confounded prize with booty. Prize has been defined as follows:

> **Prize. In maritime law.**—The apprehension and detention at sea of a ship or other vessel by authority of a belligerent power, with either the design of appropriating it, with the goods and effects it contains, or with that of becoming master of a whole or a part of its cargo.

The vessel or goods thus taken.

Goods taken on land from a public enemy are called booty; and the distinction between a prize and booty consists in this: That the former is taken at sea and the latter on land. (*Bouvier's Law Dict.*)

Capture of prize may be generally defined as the taking by a belligerent of enemy property on the high seas with an intent to convert and appropriate it to the belligerent's use. (*Roberts, Admiralty and Prize*, 464.)

Maritime capture or prize.—Lawful prize includes enemy property captured on the high sea or in territorial waters belonging either to the captor or to the enemy, and property of neutrals captured and confiscated for breach of blockade, or as contraband of war. (*Risley, Law of War*, 144.)

Booty, on the other hand, is thus defined:

The capture of personal property by a public enemy *on land*, in contradistinction to prize, which is a capture of such property by such an enemy *at sea*. (*Bouvier's Law Dict.*)

Strictly speaking, booty is the property captured, rather than the capture of such property, but with this qualification the definition is, it is submitted, absolutely correct.

Towns, forts, lands, and all immovable property taken from the enemy are called *conquests;* captures made on the high seas are called *prize;* movables taken on land are called *booty*. (*2 Baker's Halleck's Int. Law*, 74.)

Pothier treats of booty and prize as follows:

Of what is taken from the enemy.

86. Besides the right of taking possession by which we acquire property in things which belong to no one, by taking possession of them, which we have treated of in the preceding section, there is another species of right of taking possession, which exists by the law of nations, by which a sovereign, and those upon whom he confers his right, acquire property in the things which they take from their enemies in a just war.

In this species of taking possession must be included conquests and booty, which will form the subject of the first article; and maritime prizes (*prises sur mer*) which will form the subject of the second. We shall add a third article on prisoners of war.

ARTICLE I.—OF CONQUESTS AND BOOTY.

Par. I. Of conquests.

87. The right of conquest is the right which a sovereign, who has the right to make war, has, when he does so justly, to acquire property in the cities, castles, and lands of the enemy by taking possession of them.

* * * * *

Par. II. Of booty.

88. All personal property which the victors take from the vanquished is called booty, or *præda bellica.*

There are two species of booty. The first species is that which is taken in a battle, in a fight, or in any other public expedition. As the battle is fought or the expedition undertaken in the name of the king, so it is the king who is regarded as taking all the booty that is taken in it, and who acquires the property therein by the agency of his troops, who only lend him their arms, and who acquire for the king and in the name of the king all the booty which is taken.

This is why the jurisconsult Modestinus holds that a soldier who abstracts any article of booty is guilty of the crime of peculation: *Is qui prædam ab hostibus captam subripuit, lege peculatus tenetur ; l. 13, ad. L. Jul. pecul.*

Although the property in all booty is acquired by the king, sometimes the general, presumably with the king's consent, distributes a part among the troops to encourage them.

89. A second species of booty is that which troops take when allowed to make pillage of a city, as in the case of Bergen-op-Zoom. In this case the general, in the name of the king, and as being deemed to have power from him, grants to his troops the rights which he has, *jure belli*, to take possession of, and by so doing to acquire property in things which he permits them to pillage. In consequence, each soldier, as being in this regard a concessionary of the rights of the king, acquires, *jure belli*, property in the things of which he has taken possession in pillage.

* * * * *

Article II.—Of Prizes which are Taken on the Sea.

We shall see, in the first paragraph, who are those who have the right to cruise against enemy vessels; in the second, what vessels and property are lawful prize; in the third, what captains of vessels armed for war must observe when they have made a prize, and how the produce of the prize is distributed; in the fourth we shall treat of ransom.

* * * * *

Par. II. What vessels and property are lawful prize.

95. All vessels pertaining to the enemy, whether they are armed for war or are merchant vessels, can lawfully be taken, according to the laws of war, either by the officers of the Kings's navy or by captains of privateers who have a commission from the King. (Article 4.)

* * * * *

Not only the enemy ship which has been taken is good prize; all the merchandise and all the property which are found on the ship are equally good prize.

This is so whoever may be the owners of the merchandise which is found on the enemy vessel which has been taken. This is expressly decided by article 7, which reads: "The merchandise of our subjects and allies which is found in an enemy vessel shall be equally good prize." (Pothier, De la Prop., pt. 1, ch. II.)

Then follows a discussion of various questions in regard to prize, but not a word is said to indicate that

anything other than ships and their cargoes can be lawful prize.

Owing, however, to the fact that both booty and prize belong primarily to the Sovereign, so that private individuals can have no rights in either but such as the Sovereign may grant, and to the further fact that British vessels of war and privateers were often granted the right to take booty as well as prize, there are some English reported cases in which booty is treated precisely as prize would be, and it is even probable that the essential difference between the two was sometimes overlooked. Moreover, several British statutes expressly provided that the ships of the royal navy and privateers might seize and take "any place or fortress upon the land;" but it is to be noted that it was not until 1779 that any statute was passed expressly authorizing the taking *as prize* of "any ship or vessel, goods, ammunition, arms, stores of war, or merchandise belonging to or possessed by any of His Majesty's enemies, *upon the land*, or in any sea, creek, haven, or river." (Stat. 19 George III, c. 67.) Apparently the prize acts passed before 19 George III were construed to cover property taken in any place or fortress upon the land, the word "place" presumably meaning a fortified place, but the act of 19 George III, which, not having been enacted until after the Declaration of Independence, never was in any sense a part of the law of the United States, was the first to use the broad language of the passage above quoted.

As might have been expected, the essential difference between prize and booty was well understood by

that great authority, Lord Stowell, who adjudicated many cases of each class. He said:

> I know no other definition of prize goods than that they are goods taken on the high seas, *jure belli;* out of the hands of the enemy. (*The Two Friends*, 1 Rob., 271, 284, A. D. 1799.)

The statute of 46 George III, c. 100, provided:

> That, from and after the passage of this act, all and every prize agent and prize agents, * * * shall, from and out of the proceeds of all prizes which, after the passage of this act, shall be taken during the present war by any ship or vessel of war in His Majesty's pay, retain for the use of the said royal hospital, and shall within ten days next after the distribution of the proceeds of every such prize * * * pay over to the treasurer of the said royal hospital or his deputy, etc.

In construing this statute Lord Stowell said:

> Here is not a word about land booty, taken by the conjunct operation of the army and navy, and I am, therefore, led to the consideration of the meaning of the word prize as here applied. It evidently means maritime capture effected by maritime force only—ships and cargoes taken by ships. It is perfectly well known that a land force has no interest in prize, properly so called; what a land force takes by itself is not prize, but booty. (*Genoa and its Dependencies*, 2 Dods., 444, A. D. 1820.)

The concluding sentence can not mean that property captured on land is only booty when captured by

a land force, for it had just been stated that it was booty when captured "by the conjunct operation of the army and navy." In this particular opinion Lord Stowell said nothing about booty captured by a naval force acting alone, because the case before him was not of that character, but involved a "conjunct operation." Had he had to pass on a case of property taken on land by a naval force he would, however, have unquestionably held that that also was booty, for he had already announced positively, in *The Two Friends*, that prize was something "taken on the high seas."[a] Booty is property captured on land, whether taken by a land force, a naval force, or a combined land and naval force, and the mere fact that in England grants of the right to booty have been made to the parties to whom prize rights have been granted does not change the character of booty or the meaning of the term "prize."

Lord Stowell was evidently thinking of prize in the true sense when he wrote in 1794, in regard to "the general principles of proceeding in prize causes," as follows:

> When two powers are at war, they have a right to make prizes of the ships, goods, and effects of each other upon the high seas. Whatever is the property of the enemy may be

[a] It is superfluous to remark that while the expression "the high seas" is sometimes used to mean uninclosed waters, it is also frequently used to include any waters on the coast "without the boundaries of low-water mark," though within a bay or roadstead (*United States* v. *Ross*, 1 Gall., 624), or, in other words, the waters over which a court of admiralty has jurisdiction. As used in the phrase quoted in the text, the latter meaning was obviously intended.

> acquired by capture at sea. (Story, Notes on the Principles and Practice of Prize Courts, 3; Wheaton on Captures, 310.)

Lord Stowell's paper does not refer to captures on land at all, although the British statutes gave such captures practically the same status as captures at sea. This fact evidently did not, in his opinion, bring the former class of captures within the "general principles" of prize law.

The earlier decisions under the British commissions and statutes are reviewed in *Lindo* v. *Rodney*, decided in 1782, which is reported in a note to *Le Caux* v. *Eden* (2 Douglas, 613).

The case arose on an application for a prohibition in the King's Bench to stop the judge of the Admiralty from proceeding to the condemnation of goods taken by the British land and sea forces (the land forces being on board the ships) at the island of St. Eustatius, and the question was, Whether the goods, being taken on land, though in consequence of a surrender to ships at sea, excluded the only prize jurisdiction known in the Kingdom? Lord Mansfield held that no prohibition could issue, such goods being properly subject to condemnation as prize. His opinion, based upon certain ancient treaties and commissions, upon judgments rendered in the court of Admiralty, and upon the statutes of 17 Geo. II, c. 34, § 2; 29 Geo. II, c. 34, § 2, and 19 Geo. III, c. 67, § 2, was as follows:

> 1. That so far back as can be traced, which is for a century, the Admiralty has judged of

and condemned goods taken on land as prize, as well as goods taken at sea.

2. That every common law authority to be found on the subject allows and supports the jurisdiction.

3. That the legislature has, in many acts of Parliament, recognized and referred to it as clear, certain, and undoubted.

As regards all cases prior to the statute of 17 Geo. II, it is enough to point out that the jurisdiction of the prize court depended upon the particular terms of a temporary commission, issued during a particular war and expiring at its close. Lord Mansfield said:

> [The commission appointing a judge of the Admiralty] enumerates particularly, as well as generally, every object of his jurisdiction; but not a word of prize.
>
> To constitute *that* authority, or to call it forth, in every war, a commission under the great seal issues to the lord high admiral, to will and require the court of Admiralty, and the lieutenant and judge of the said court, his surrogate or surrogates, and they are thereby authorized and required to proceed upon all and all manner of captures, seizures, prizes, and reprisals of all ships and goods that are, or shall be, taken; and to hear and determine, according to the course of the Admiralty and the law of nations.

That the jurisdiction was a temporary one, given by special commission, is clearly shown by the reference to "the terms of the patent under the broad seal of England," in the case decided April 15, 1692, cited by

Lord Mansfield. Moreover the words, "to hear and determine according to the law of nations," must be understood in connection with the terms of the commission, whatever they might be. If the commission gave a jurisdiction beyond what was ordinarily recognized by the law of nations, that law was to be followed only in so far as it accorded with the commission.

Similarly, the statutes did not grant a permanent authority, but were limited to captures made during a particular war. A special jurisdiction, granted from time to time, limited to the periods of particular wars and to property captured from particular nations, is obviously very different from a permanent jurisdiction over property captured from any enemy in any war; and, moreover, a special jurisdiction granted from time to time to the admiralty courts of a particular country can not be said to be founded upon the law of nations. The English commissions and statutes made booty, when taken by naval forces, prize *in England*, but established no general rule of law for all nations, and even in England, in cases not involving the peculiar operation of such commissions and statutes, the fundamental distinction between booty as property taken on land and prize as property taken at sea always remained. This is shown by the definitions given by Lord Stowell in the *Two Friends* and *Genoa and its Dependencies* (already cited) and by the case of the *Ooster Ems*, not reported, but cited in the *Two Friends*, where the High Court of Admiralty decided that it had no jurisdiction over the property of enemies taken ashore

from a vessel stranded on the Goodwin Sands, such removal having apparently taken place before any attempt was made to hold the goods as prize.

The English cases which recognize the right to treat booty taken on land as prize, were not based upon any general principles of admiralty law common to all countries, but purely and solely upon the English statutes, as to which the view of Peters, J., though announced with reference to another feature of prize jurisdiction, is not inappropriate:

> Acting as we now do, in a national and not a dependent capacity, I can not conceive that we are bound to follow the practice in England any more than that of our own or any other nation. Customs purely colonial were parts of our laws, even in the time of our connection with Great Britain. * * * The Admiralty proceeds by a law which considers all nations as one community, and *should not be tied down to the precedent of one nation.* (Opinion in *Jennings* v. *Carson*, in the district court, 4 Cr., 7, note.)

In strong contrast with the provisions of the British statutes, the American statutes, from the very first, made no provision for treating any captured property as prize except vessels and their cargoes. In fact, the prize laws in force from 1800 to 1864 used language which necessarily excluded the idea that any other kind of property could be held as prize.

The rules for the regulation of the Navy of the United Colonies, adopted November 28, 1775, con-

31100

tained a form of ship's articles to be signed by the officers, seamen, and marines, in which the following expressions occur:

> We do also severally agree and pledge ourselves, that when any prize or prizes have been taken, to follow the express directions of the said ———, or his successors, in boarding the said prize, and be under the command of any officer whom the said ——— shall appoint, and be assisting to him to carry the said prize to whatever port or ports said prize or prizes shall be assigned by the said ———. And we do hereby further severally agree and covenant in that case to be true and faithful in the discharge of our duties and trust, and will not in any shape embezzle, defraud, or plunder anything on board such prize or prizes. * * *
>
> And it is also further agreed to be the true intent and meaning of all parties hereto that any officer or officers or any of the ship's company sent on board any prize or prizes shall have as good a share and interest of any prize that shall be thereafter taken during his or their absence as if he or they had been on board the said vessel at the time of taking thereof. * * * Provided always, * * * that if the said officer or officers and such of the said ship's company to whom the conduct and management of any prize has been intrusted do not (first having accepted the commands of the said commander concerning the said prize under his or their custody) immediately repair to the respective port or harbor where the said ———, or his successor in command, shall order, or

> do not proceed with the said prize or prizes so taken to the respective port or ports to be assigned by said ——— for the time being, then they, etc.
>
> He who first discovers a ship or vessel which shall afterwards become a prize shall be entitled to a double share of such prize.
>
> He who shall first board a ship or vessel making resistance, which shall become a prize, shall be entitled to a triple share. (1 Journals of Congress, 250 to 252.)

It is clear that the only possible prizes to which the above ordinance refers are ships and their cargoes. Had it been intended to include booty taken on land, words would have been used to express such intention.

On April 2, 1776, Congress adopted a form of commission to privateers, authorizing commanders of vessels to fit them out in a warlike manner,

> and by and with the said ——— and the crew thereof, by force of arms, to attack, seize, and take the ships and other vessels belonging to the inhabitants of Great Britain, or any of them, with their tackle, apparel, furniture, and lading, on the high seas, or between high and low water marks, and to bring the same to some convenient port in the said colonies, in order that the courts which are or shall be hereafter appointed to hear and determine cases, civil and maritime, may proceed in due form to condemn the said captures, if they be adjudged lawful prize. (2 Journals of Congress, 111.)

On the next day Congress adopted a resolution providing that blank commissions for privateers should be

signed by the President and sent to the general assemblies of the several colonies, to be filled up and delivered to persons "desiring to fit out private ships of war for making captures of British vessels and cargoes." Another resolution of the same date required every privateer to produce a statement in writing giving a description of his vessel and its crew and equipment, and to give a bond for the faithful performance of the various requirements of his commission, the form of bond containing the words:

> ——— hereby apply for a commission and letters of marque and reprisal to arm, equip, and set forth to sea the said ——— as a private ship of war, and to make captures of British vessels and cargoes.

The same resolution also adopted the following instructions to commanders:

> I. You may, by force of arms, attack, subdue, and take all ships and other vessels belonging to the inhabitants of Great Britain on the high seas and between high-water and low-water marks, except ships and vessels bringing persons who intend to settle and reside in the United Colonies, etc.
>
> II. You may, by force of arms, attack, subdue, and take all ships and other vessels whatsoever carrying coal, arms, gunpowder, ammunition, provisions, or any other contraband goods to any of the British armies or ships of war employed against these colonies.
>
> III. You shall bring such ships and vessels as you shall take, with their guns, tackle, apparel,

furniture, and ladings, to some convenient port or ports of the United Colonies, that proceedings may thereupon be had in due form before the courts which are or shall be there appointed to hear cases, civil and maritime.

IV. You, or one of your chief officers, shall bring or send the master and pilot and one or more principal person or persons on any ship or vessel by you taken, as soon after the capture as may be, to the judge or judges of such court as aforesaid, to be examined upon oath, etc.

V. You shall keep and preserve any ship or vessel and cargo by you taken until they shall, by a sentence of the court properly authorized, be adjudged lawful prizes. (2 Journals of Congress, 113, 115.)

The revised instructions contained in the ordinance of May 2, 1780 (3 Jour. of Cong., 452), refer distinctly to operations on land, but do not grant any prize rights in property taken on land. They read:

I. You may, by force of arms, attack, subdue, and take all ships and other vessels belonging to the Crown of Great Britain, or any of the subjects thereof, on the high seas, or between high and low water marks. * * * And you may also *annoy the enemy* by all the means in your power, by land as well as by water.

As the other paragraphs of the ordinance of 1776 were reenacted without material change, it is perfectly clear that while privateers might harry the enemy's coasts, they could not take any property on land for their own benefit.

These provisions in regard to privateers are particularly noticeable in the contrast which they furnish to the act of 19 George III, c. 67, passed in 1779, which authorized privateers to attack, surprise, seize, and take "any place or fortress *upon the land*, or any ship or vessel, goods, ammunition, arms, stores of war, or merchandise belonging to or possessed by any of His Majesty's enemies *upon the land*, or in any sea, creek, haven, or river." British privateers, as well as vessels of the British navy, were authorized to take property on land, and to proceed in the same way in regard to such property as if it had been a vessel or its cargo, but the commissions issued to American privateers extended only to the taking of vessels and their cargoes, and nothing except vessels and their cargoes could be treated as prize even when taken by ships of the American Navy. After the adoption of the Constitution the first act to regulate prize was that of March 2, 1799 (1 Stats., 709–715), providing as follows:

> SEC. 5. *And be it further enacted*, That all captured national ships or vessels of war shall be the property of the United States—all other ships or vessels, being of superior force to the vessel making the capture, in men or guns, shall be the sole property of the captors—and all ships or vessels of inferior force shall be divided equally between the United States and the officers and men of the vessels making the capture.
>
> SEC. 6. *And be it further enacted*, That the produce of prizes taken by the ships of the

United States, and bounty for taking the ships of the enemy [i. e., the national vessels of war, which were not to be held as prize, and for which a bounty was given instead], be proportioned and distributed in the manner following, to wit:

1. To the captain actually on board at the time of taking any prize, being other than a public or national vessel, or ship of war, three-twentieths of that proportion of the proceeds belonging to the captors.

* * * * *

9. Whenever one or more of the ships of the United States are in sight at the time of [when?] any one or more other ships as aforesaid are taking a prize or prizes, or being engaged with an enemy, and they shall all be so in sight when the enemy shall strike or surrender, they shall share equally, according to the number of guns and men on board of each ship so in sight; but no privateer or armed ship, being in sight of a national ship of war at the taking of any prize, shall be entitled to any share in such prize or prizes.

The above provisions contain not a word to indicate that any booty or property taken on land is to be treated as prize, and the omission is very significant. National ships of war are not to be prize, but are to belong to the United States; and under another clause of section 6 a bounty is to be paid for their capture. Other ships or vessels, including of course their cargoes, are, if of superior force, to be the sole property of the captors, but if of inferior force, to be divided equally

between them and the United States. The rules for the distribution of prize money, or of the bounty given in lieu of it, are manifestly intended to be complete; but if booty was also intended to be treated as prize it is most extraordinary that there is no rule for the distribution of the proceeds. Were they all to go to the captors, or, if not, what was to be their share and what that of the United States? The act fails to answer these important questions, and the only reasonable inference is that it was not intended that they should arise, because it was not intended that any booty, any property taken on land, should be treated as prize.

The act of April 23, 1800 (2 Stats., 45, 52), provided as follows:

> SEC. 5. *And be it further enacted*, That the proceeds of all ships and vessels, and the goods taken on board of them, which shall be adjudged good prize, shall, when of equal or superior force to the vessel or vessels making the capture, be the sole property of the captors; and when of inferior force, shall be divided equally between the United States and the officers and men making the capture.

The act containing this section remained in force until the enactment of the act of July 17, 1862 (12 Stats., 600), when the section above quoted was reenacted in identical language in section 2. Had there ever been any possibility of a doubt as to the meaning of this language in excluding booty, or property taken on land, from the category of prize property, the

decision in *Mrs. Alexander's Cotton* (2 Wall., 404–422) necessarily removed all doubt on this point.

The acts of June 26, 1812, and January 27, 1813 (2 Stats., 759, 792), relating to privateers and prizes taken by them, used the words "captures and prizes of vessels and property," "vessels, goods, and effects," but the seventeenth section of the act of 1812 and the fifth section of the act of 1813 explain the scope of these terms by using the term "captured vessels and cargoes" in a connection which shows conclusively that "vessels and cargoes" were the only sources of prize money within the contemplation of these acts. In fact, the fifth section of the act of 1813 provides that privateers or their agents "may, at any time before a libel shall be filed against *a captured vessel or her cargo*, remove the same from any port into which *such prize vessel or property* may be first brought." This interchangeable use demonstrates beyond question the fact that the term "property," in these acts, means "cargoes" and nothing else.

The case of *Mrs. Alexander's Cotton*, already cited, decided March 9, 1865, overruled the earlier district court cases of *1,253 Bags of Rice* (Blatch. Pr. Cas., 211; 18 Fed. Cas., 723), *282 Bales of Cotton* (*id.*, 302; 24 Fed. Cas., 435, reversed by the circuit court, presumably because the property was taken on land, but there is no report of the decision), and *680 Pieces of Merchandise* (2 Spr., 233; 22 Fed. Cas., 252). It held that although the capture of property on land was lawful, property so taken belonged to the Government alone, because

the language of the act of 1862 "*excludes property on land from the category of prize for the benefit of captors*, and seems to be decisive of the case as far as the claims of captors are concerned." As already stated, the statute construed in that case was, as to this point, a reenactment, in identical language, of the act of 1800, previously in force, so that *Mrs. Alexander's Cotton* interprets the act of 1800 as well as that of 1862. More than this, it shows by manifest analogy that the act of 1799, in providing only for the distribution of the proceeds of "ships or vessels" as prize money, meant that such "ships or vessels" and whatever goods they might contain, should be the only source of prize money.

In regard to this case of *Mrs. Alexander's Cotton* it must be admitted that the capture could have been held no prize on another ground, viz, that it was made in the course of a conjoint military and naval expedition; but the fact remains that the case was not decided on that ground, but solely on the ground that the property was taken on land. The other point was apparently not raised, and the first decision in regard to such a matter was made in *The Siren* (13 Wall., 389), seven years later.

It is true that in *The Emulous* (1 Gall., 563), and in the same case on appeal, *Brown* v. *United States* (8 Cranch., 110, 138), Story, J., stated that the jurisdiction of the Admiralty "is not confined to mere captures at sea," and that the Admiralty "not only takes cognizance of all captures made at sea, in creeks, havens,

and rivers, but also of all captures made on land where the same have been made by naval force or by cooperation with a naval force." This view was, however, based exclusively upon the British decisions, which, as already stated, were rendered in accordance with certain peculiar British commissions and statutes. As a statement of British law, it was correct, but while the view that that law should control an American court of admiralty is entitled to respect as that of an eminent jurist, it must not be overlooked that Story, J.'s, decision in *The Emulous* was reversed, and that his opinion in *Brown* v. *United States* was a dissenting opinion, and that "it is in this, as well as in several other positions of his very learned opinion, that he is overruled by the court. The result of the case in the court of final resort certainly is that property on land is not, without the aid of the statute, liable to capture and condemnation as prize of war." (*United States* v. 269½ *Bales of Cotton*, 1 Woolworth, 236, 264, *per* Miller, J.) The precise point decided in *Brown* v. *United States* was that in the absence of legislative authority British property found in the United States, on land, at the commencement of hostilities with Great Britain, could not be condemned as enemy's property; in other words, that the property was not subject to capture at all; and hence it was unnecessary to decide the question as to whether the capture, if it had been lawful, would have entitled the captor to have the property treated as prize within the jurisdiction of a court of admiralty. Had the latter question arisen, it can hardly be doubted, in view of

the language of the statutes then in force, that the court would have reached the same conclusion which was ultimately reached in 1865 in *Mrs. Alexander's Cotton*.

It appears, therefore, to be indisputable that down to and including the act of 1862 no statute of the United States ever granted any right of prize except in ships and their cargoes; and it may be added in this connection, that while there are several statutes granting prize money to individuals for vessels captured and afterwards appropriated by the United States, or restored, there is no case of a similar grant for any prize taken on land.

The present libel, however, is not filed under the act of 1862, but under sections 4613–4634 of the Revised Statutes, which sections were originally enacted in the act of June 30, 1864 (13 Stats., 306), and the meaning of those sections at the time of their original enactment and subsequent reenactment must be inquired into. Section 10 of the act of June 30, 1864, reads as follows:

> SEC. 10. That the net proceeds of all property condemned as prize shall, when the prize was of superior or equal force to the vessel or vessels making the capture, be decreed to the captors; and when of inferior force, one-half shall be decreed to the United States and the other half to the captors: *Provided*, That, in case of privateers and letters of marque, the whole shall be decreed to the captors, unless it shall be otherwise provided in the commissions issued to such vessels. All vessels of the Navy

> within signal distance of the vessel or vessels making the capture, under such circumstances and in such condition as to be able to render effective aid if required, shall share in the prize, and in case of vessels not of the Navy, none shall be entitled to share except the vessel or vessels making the capture, in which term shall be included vessels present at the capture and rendering actual assistance in the capture. All prize money adjudged to the captors shall be distributed in the following proportions, namely:
>
> [Then follow the rules as to distribution, differing in some points from those established in 1862.]

The same act expressly repealed, *inter alia*, section 2 of the act of July 17, 1862, but said nothing about section 5 of the act of April 23, 1800, which was in the same words. In the absence of any law to the contrary the reenactment of any statute or section is not of itself a repeal of the original statute or section (*Cordell* v. *State*, 20 Ind., 1), and section 20 of the act of July 17, 1862, had merely provided that "all provisions of previous laws, which are inconsistent with those of this act, shall be, and are hereby, repealed" (12 Stats., 610). Section 5 of the act of April 23, 1800, not being inconsistent with anything in the act of July 17, 1862, but merely identical with section 2 of that act, was clearly not within the above clause of repeal, and hence must have remained in force, both during the lifetime of said section 2 and after its repeal.

Even were this otherwise, it is evident that if Congress had intended to change the law and extend the jurisdiction of a prize court to property taken on land, it would have used language capable of expressing that intention, especially as it is well settled that maritime prize does not include such property except by force of a statute which expressly includes it. The act of 1864 introduced certain new provisions as to the ascertainment of the vessels which were to be regarded as captors, and incidentally it changed the words "the proceeds of all ships and vessels, and the goods taken on board of them" to "the net proceeds of all property condemned as prize;" but it did not use any such words as "land," or "property on land," or "property wherever taken." It simply referred to "property," by which of course was meant such property as was understood to be capable of being made prize of war according to the law as established in the United States when the act was passed. Had any statute of the United States ever provided that booty, property taken on land, should be treated as prize, there might be some color for a contention that the word "property," in the act of 1864, was intended to include booty, but as the statutes of the United States, ever since it became a nation, had always excluded booty from "the category of prize for the benefit of captors," there is absolutely nothing to support such a contention.

Certainly it can not seriously be contended that under the old law the restriction of prize "to ships or vessels and the goods taken on board of them" constituted a

wrong which it was intended to set right by the prize act of 1864. Was the restriction of prize captures to property on the sea a wrong which called for a remedy? The whole system of prize, of the plundering of private and public property for the benefit of individuals, has been for more than two centuries condemned by thoughtful people as inconsistent with civilization and subversive of true naval discipline. This feeling has led to a gradual restriction of the practice, to the abandonment of privateering, and very recently to the repeal of our prize statutes. That Congress should have intended, in 1864, to extend the scope of the prize law, to make that prize which had never previously been so in the United States, is *per se* improbable, as such an intention would have been opposed to the tendencies of civilization. Certainly such a change would not have escaped the notice of this court when deciding the case of *Mrs. Alexander's Cotton*, and the court would undoubtedly have pointed out that its decision would not apply to property taken under the act of 1864, which had been passed more than eight months before the decision was rendered. The absence of all suggestion that the law had been changed is very significant.

Again, in *United States* v. 269½ *Bales of Cotton* (1 Woolw., 236, 264), Miller, J., said: "Property on land is not, without the aid of statute, liable to capture and condemnation as prize of war." This suit was brought under the act of 1862, so that the judgment, rendered in 1868, was directly controlled by *Mrs. Alexander's Cotton*, but it is significant that Miller, J., both thought

the matter so clear that he did not refer to that authority and also said not a word to indicate that it had ever been suggested that the law as it stood when the property under consideration was taken had since been changed by the act of 1864.

The change from the wording of section 2 of the act of July 17, 1862, to that of section 10 of the act of June 30, 1864, can not be explained by any previous judicial construction of the former section, for no authoritive decision had as yet been rendered, and the three district court cases (already cited), which were subsequently overruled, held that property taken on land was prize, even under the act of 1862. Congress, while undertaking to improve the phraseology of the law (and the clause relating to relative force certainly needed improvement), may well be presumed to have intended that the meaning of the law should remain the same that it had been since before the first year of the century, and that if it should be necessary to decide what that meaning was, the Supreme Court could be trusted to give a proper decision, whatever the lower courts might have done. No motive for a change in the effect of the law has been, or probably can be, suggested.

The commissioners who compiled the Revised Statutes either overlooked section 5 of the act of April 23, 1800, or considered it so completely incorporated into section 2 of the act of July 17, 1862, as to have been repealed by the repeal of that section, so that they did not retain it in the revision, and hence section 4630 of the Revised Statutes, which was originally enacted as

the first sentence of section 10 of the act of June 30, 1864, is the only provision on this point. Whether section 5 of the act of April 23, 1800, was really entitled to incorporation in the Revised Statutes or not, one thing is certain, viz, that it has always been understood that under section 4630, as previously under section 5 of the act of April 23, 1800, and section 2 of the act of July 17, 1862, property taken by a naval force on land was not prize for the benefit of captors. Thus in the edition of the Revised Statutes issued in 1878, prepared by Hon. George S. Boutwell, the commissioner appointed under the act of March 2, 1877 (18 Stat., 268), the very first section relating to prize is section 4613, which was section 33 of the act of 1864, reading as follows:

> The provisions of this title shall apply to all captures made as prize by authority of the United States, or adopted and ratified by the President of the United States.

Commissioner Boutwell was required by the act of 1877 to insert "marginal references to the decisions of the several courts of the United States," and two such references were made in regard to this section 4613. One was to *The Cotton Plant* (10 Wall., 577), which held that a capture on the Roanoke River was not a prize, because made on "the inland waters of the United States;" while the other reference was to *Mrs. Alexander's Cotton.* Commissioner Boutwell, at least, was fully convinced that the words "captures made as prize," in this section, did not mean captures on land,

and until the date of the filing of the present libel, it does not appear that the correctness of his view was ever disputed.

Mr. Boutwell's view is evidently shared by Sir Sherston Baker, for his edition of Halleck's International Law, published in 1893, contains this note (Vol. II, p. 81):

> Property captured on land by a naval force of the United States is not a "maritime prize," even though it may have been a proper subject of capture generally. *Alexander's Cotton* (2 Wall., 404), and see act of March 3, 1863, 12 Stat. at L., 820; act of July 2, 1864, 13 Stat. at L., 375.

The statutes referred to in the above note are the abandoned and captured property act, and the section in regard to captures on inland waters. There is no suggestion that the prize act of 1864 changed the law from what it had been previously, as interpreted in *Mrs. Alexander's Cotton*. On the contrary, the note can only be regarded as a distinct statement that property captured on land by a naval force of the United States was not maritime prize, either after the passage of the act of 1864 or before.

If the act of 1864 had been enacted to change the existing law and make booty subject to adjudication as prize, it would have operated as a partial repeal of the act of March 12, 1863 (12 Stat., 820), known as the abandoned and captured property act. That act did not "apply to any lawful maritime prize by the naval forces of the United States," and the words "lawful

maritime prize," as used with reference to the prize law of 1862, then in force, meant merely "ships and vessels, and the goods taken on board of them." Now, if the act of 1864 applied to property taken on land, it would have applied to property to which the abandoned and captured property act had previously applied, thus partially repealing that act. Had Congress had any such intention as this, it would have expressed that intention in unmistakable language, but certainly no such intention can be gathered from the language used.

As regards the application of the doctrine of *Mrs. Alexander's Cotton* to the act of 1864, it can not possibly be held that the case applies to private property only, as distinguished from the property of the hostile nation or government. It was held that though the cotton in question was private property, it was just as much the subject of capture as if it had been the property of the Confederate Government, but that the capture, though lawful, was not a capture for the benefit of the captors, but for that of the United States, and this because the property was taken on land, not on the sea.

Even if the prize act of 1864 be considered solely by itself, without reference to the legislation which had preceded it, it is still evident that every provision of the act contemplated the capture of vessels and cargoes only, and that no provision contemplated that any other kind of property should, if captured, be the subject of adjudication as prize. In the opinion of the court below the statute is carefully analyzed and its

provisions compared, with the conclusion that "the legislative intent, gathered from the whole statute, excludes from 'prize' property captured on land." This part of the opinion in particular is well worth careful attention. (Rec., 153–155.)

The first section of the act begins with the provision that "It shall be the duty of the commanding officer of any vessel or vessels making a capture to secure the documents of the ship and cargo." This practically defines a "capture" as a "ship and cargo." The same section provides that the commanding officer "shall send to said court, as witnesses, the master, one or more of the other officers, the supercargo, purser, or agent of the prize, and any person found on board whom he may suppose to be interested in or to have knowledge respecting the title, national character, or destination of the prize. He shall send the prize, with the documents, officers, and witnesses, under charge of a competent prize master and prize crew, into port for adjudication." Here, again, "the prize" is referred to in a connection which clearly indicates that the only species of prize contemplated by the act was primarily a "ship and cargo." The same section refers to "the captured vessel or any part of the captured property." As nothing had previously been suggested in this section about any other kind of "captured property" than "a ship and cargo," it is evident that the words "captured property," when used to indicate any other property than a captured vessel itself, can only refer to a captured cargo.

The third section refers to the duties of the prize master of the captured vessel.

The sixth section refers to the duties of the prize commissioner in regard to the captured vessel and its cargo or stores.

The tenth section provides "that the immediate proceeds of all property condemned as prize shall, when the prize was of superior or equal force to the vessel or vessels making the capture, be decreed to the captors; and when of inferior force one-half shall be decreed to the United States and the other half to the captors." This provision is very similar to that of section 11 in regard to the rate of bounty for persons on board of hostile vessels of war destroyed in action, in regard to which it has been decided that the word "force" means naval force merely, without reference to any land force which may happen to be in a position to support or aid the enemy's naval force. (*Dewey* v. *United States*, 178 U. S., 250, 510.) Obviously the same rule should be applied to section 10, and it must be held in the present case that the prize was of inferior naval force to the vessel or vessels making the capture. If "the force" of the prize can not include any land force, it is evident that the prize itself can not be anything that is on the land, and that the words "all property taken as prize," in section 10, must refer exclusively to vessels and their cargoes.

Section 11, in regard to bounty, refers plainly to hostile vessels of war only.

Section 33, applying the act to "all captures made as prize by authority of the United States, or adopted and

ratified by the President of the United States," is the same in connection with which, as already stated, Mr. Boutwell cited the case of *Mrs. Alexander's Cotton* in the official edition of the Revised Statutes.

The other sections of this act refer to vessels and other prize property in general terms, but the meaning of those terms is sufficiently defined and limited by the sections which have been particularly referred to above. The language of these latter sections clearly confines the operation of the act to captured ships and their cargoes, and there is absolutely nothing in the act, taken as a whole, to warrant its application to property captured on land.

The libellant's counsel, indeed, call attention to *Seventy-eight Bales of Cotton* (1 Low., 11; 21 Fed. Cas., 1100) as an instance where the capture was held to be good prize, although the requirements of the act of June 30, 1864, as to securing documents, putting a prize crew aboard, etc., could not be complied with, as the capture consisted of cotton floating on the water, and from this they draw the extraordinary inference that the act of 1864 was intended to apply to property captured on land. The simplest answer to this remarkable contention is that as the cotton was captured on May 31, 1864, the case did not arise under the act of June 30, 1864, but under that of July 17, 1862, under which, as this court has held, only property captured afloat was prize. But the contention could not have held good even if the capture had been made under the act of 1864. Primarily, the cotton was flotsam,

but, having evidently been jettisoned by an enemy or a neutral engaged in violating blockade, it was cargo subject to capture, and being captured afloat it was prize, its status not having been changed by its being jettisoned. As cargo captured afloat, it would have been within both the letter and the spirit of the act of 1864.

When the various sections of the prize act of 1864 were reenacted in the Revised Statutes the only change was a change in the order of the sections. The thirty-third was made the first section under the title "prize," and the thirty-second was made the second section under that title, while the first section of the act was made the third section under that title, and there were a number of other similar changes. There was no appreciable change in language, nor were any new sections added which would have any effect on the construction of those which were reenacted. Hence it is submitted that, as shown by Commissioner Boutwell in his note to section 4613, the doctrine of *Mrs. Alexander's Cotton* applies to the prize laws of the United States in force at the time when the property to which the present libel relates was captured.

The counsel for the libellant, however, contend that the design of the legislation of 1864 was to extend the right of prize beyond ships and their contents to whatever else under the accepted rule of prize courts was to be considered prize of war. A sufficient answer to this contention is to say that, except for the anomaly introduced by the British commissions and statutes, "the

accepted rule of prize courts" was that property on land was not the subject of maritime prize. Counsel go further, however, and state that the intention was to restore what they call "the ancient rule," the English practice of treating the capture of public property of an enemy on land, by a force exclusively naval, as prize. It is submitted that a practice depending upon the particular terms of special commissions of temporary duration, issued from time to time, and necessarily subject, as to their terms, to the dictates of the policy of their particular day, can not properly be called an "ancient rule," and even if it could it was certainly not a part of that common law which was the inheritance of the descendants and successors of the founders of the thirteen colonies. As a matter of fact the act of 1864, and the Revised Statutes which reenact it, sufficiently define what shall be prize, to the exclusion of property taken on land, as has already been pointed out above; but even if this had been left doubtful, one would have to turn to the law as previously established in the United States, or to the recognized law of nations, to elucidate the doubt. The peculiar law of England, at variance with the recognized law of nations, would be the last authority which Congress could have had in mind in 1864.

As already stated above, section 10 of the act of 1864 introduced new provisions defining the rights of vessels within signal distance, and slightly modified the rules of distribution, besides covering the ground of section 2 of the act of 1862 in slightly different but

fairly equivalent language. It is scarcely conceivable that a mere change of language in a single section should have been intended to repeal the law as established by statute and ordinance ever since the outbreak of the Revolution, in regard to such a fundamental matter as the character of the property which should be subject to condemnation as prize, and to introduce by implication a rule which had never been a part of the permanent law of England, but had merely been legalized from time to time by special commission or temporary statute. Such a change, moreover, being obviously not contemplated by the other provisions of the statute and being opposed to the tendencies of civilization, and there being no apparent motive for making it, can not, it is submitted, be implied. As was well said by the late Mr. Justice Gray, when chief justice of Massachusetts:

> The legislature is not to be lightly presumed to have intended to reverse the policy of its predecessors, or to introduce a fundamental change in long-established principles of law. (*Robinson's Case*, 131 Mass., 376.)

PROPERTY RESTORED TO SPAIN.

As regards a certain part of the property to which the present libel relates, viz, property captured on land and subsequently restored to Spain under the fifth article of the treaty of Paris, there is still another reason why such property is not subject to adjudication as prize. That article provided that "stands of arms, uncaptured war vessels, small arms, guns of all calibers,

with their carriages and accessories, powder, ammunition, live stock, and materials and supplies of all kinds belonging to the land and naval forces of Spain in the Philippines and Guam, remain the property of Spain." (30 Stats., 1757.) This release and restitution of all right to property of the various kinds referred to was one which the United States had a right to make as against all parties who might have had an interest in the property as prize property if there had been no such release. The release took effect, of course, from April 11, 1899, the date when the ratifications of the treaty were exchanged, and the property affected by the release was such as had not been already appropriated by the United States for its own actual use before that date. This release or restitution having been made, not merely before any adjudication in regard to the property released, but even before any libel had been filed in regard to it, must, it is submitted, necessarily prevent the alleged captors from having any decree entered in their favor in regard to such property. The right of a government to release captured property, not merely before the filing of a libel, but at any time until the decree of condemnation is entered, is absolute and complete. No title vests in the captors until there has been a final adjudication in the prize court. (*Home* v. *Camden*, 2 H. Bl., 533.)

The law on this subject was laid down very clearly and at considerable length by Lord Stowell in *The Elsebe* (5 C. Rob., 173, 181), as follows:

> It is admitted on the part of the captors, whose interests have been argued with great force (and

not the less effective, surely, for the extreme decorum with which that force has been tempered), that their claim rests wholly on the order of council, the proclamation, and the prize act. It is not (as it can not be) denied that, independent of these instruments, the whole subject-matter is in the hands of the Crown, as well in point of interest as in point of authority. Prize is altogether a creature of the Crown. No man has, or can have, any interest but what he takes as the mere gift of the Crown. Beyond the extent of that gift he has nothing. This is the principle of law on the subject and founded on the wisest reasons. The right of making war and peace is exclusively in the Crown. The acquisitions of war belong to the Crown, and the disposal of these acquisitions may be of the utmost importance for the purposes both of war and peace. This is no peculiar doctrine of our constitution; it is universally received as a necessary principle of public jurisprudence by all writers on the subject—*Bello parta cedunt reipublicæ*. It is not to be supposed that this wise attribute of sovereignty is conferred without reason; it is given for the purpose assigned, that the power to whom it belongs to decide on peace or war may use it in the most beneficial manner for the purposes of both. A general presumption, arising from these considerations, is that government does not mean to divest itself of this universal attribute of sovereignty, conferred for such purposes, unless it is so clearly and unequivocally expressed. In conjunction with this universal presumption must

be taken also the wise policy of our own peculiar law, which interprets the grants of the Crown in this respect by other rules than those which are applied in the construction of the grants of individuals. Against an individual it is presumed that he meant to convey a benefit with the utmost liberality that his words will bear. It is indifferent to the public in which person an interest remains, whether in the grantor or the taker. With regard to the grant of the sovereign it is far otherwise. It is not held by the sovereign himself as private property, and no alienation shall be presumed except that which is clearly and indisputably expressed.

With these rules of interpretation, the title deeds of the captors must be considered to determine whether the Crown has, in these deeds, renounced that power, which in principle it possesses, and in practice has frequently exercised. If there is anything which can be supposed to produce that effect, it must be the conveyance of a right, of some species or other, to other persons, and these can be no other than the captors, in virtue of which they claim an indefeasible interest in prize once taken. The right contended for is a right to seize and bring to adjudication all ships of the enemy. Does the right to seize, thus generally given, alone bind the Crown so as to bar it from any further exercise of its power with respect to seizures? Certainly not; for, after that right is given, to seize all ships of the enemy, the Crown can exempt as it sees fit. The Crown, which declares general hostilities, can limit their operation; it can

except individuals; it grants particular passes; it exempts particular classes of the enemies' ships, notwithstanding the right thus given of seizing all ships. If, then, the right of seizing all ships, thus generally given, does not bind the Crown in its power of qualifying that right by subsequent modifications, on what ground is it contended that the exercise of its power, with respect to proceeding to adjudication, is barred by the mere act of seizure? The mere act of seizure, surely, can not work any such effect; it is an act, in itself, in some degree, always dubious till adjudication, and possibly erroneous; yet this dubious act is to convey to the party a right indefeasible to proceed to adjudication, when the very proceeding may be a further wrong done, an aggravation of costs and damages already occasioned by the improper seizure. I attended with great impatience to the able argument of Dr. Arnold, to learn what was the specific nature of the right conferred on the captors by the act of seizure, to which the effect of barring the power of the Crown to release is to be attributed. It is admitted to be, in degree, an imperfect right. In species, it was stated, if I understand the argument, to be a *jus persequendi*, a right of action, and no more; no right of interest, but a mere right of bringing to adjudication. Whatever is the nature of this right, it is conveyed only in the order of council; it is not given in the proclamation or the prize act. It is, indeed, recited in both as a thing otherwise existing, but it makes no part of the powers conferred in either of those instruments. Now, according to the construction which is, in

my opinion, to be put upon this matter, this *jus persequendi*, as it is called, is not a right conveyed, but a duty enjoined. Captors have generally a right to seize, subject to this duty of bringing to adjudication—a duty enjoined, that they may not make seizures without bringing the ships and goods seized to the notice of the proper tribunal, in order to prevent the right of seizure from degenerating into piratical rapine. If the Crown imposes that obligation, the Crown can release it. * * *

The proclamation gives the whole property, but not till after adjudication; until that time, no beneficial interest attaches. So the prize act, in like terms, gives the whole interest or property, in opposition to that proportional and partial interest given by former acts, but not till adjudication. In adverting to these instruments, it is impossible not to remark the very guarded terms in which the benefit is conferred. The proclamation gives to privateers, "after final adjudication, and not before;" not merely after adjudication, but superadding a negative pregnant, "and not before." With regard to king's ships, the grant is expressed with similar caution; it gives the neat produce of all such prizes taken, the right whereof is inherent in us and our Crown. And again, it directs that such prize "may be lawfully sold or disposed of, by them and their agents, after the same shall have been to us finally adjudged lawful prize and not otherwise." What is the use of these guarded expressions? Surely not merely the object of protecting the interests of the claimant till after

adjudication. The Crown can not be supposed to be anxious to make a reservation or exception of that, which, without any exception, would be perfectly safe; for no interest of the Crown or its grantee could divest the interest of the claimant. The reservation must, *ex necessitate rei*, *ex defectu alicujus alterius materiæ*, apply to rights over which the Crown has a dominion, and which, unless reserved, it might be supposed to have granted away. What are these rights? The right of controlling the whole proceeding till final adjudication; the right of declaring that the party shall not be further proceeded against as an enemy; the right of suspending hostility against him with regard to property which has been seized under the general order of reprisals. For such purposes, and such purposes only, it must be that the Crown has declared that till after adjudication the captor has no interest which the court can properly notice for any legal effect whatsoever. In the case of captures made by the King's own ships the authority of the Crown is most marked upon the face, and in the substance, of every part of the proceedings in the most emphatical manner. The Crown officers are the prosecutors in the name of the Crown; the final adjudication, under the very terms of the act, is a condemnation to the Crown, and most clearly the interest would vest in the Crown under that condemnation if the act had not expressly superadded that it should inure to the benefit of the captors. In seizures made by private ships of war the hand of the sovereign authority is less visible in the mode and style of proceed-

> ings; but the right of the Crown is sufficiently guarded by the repeated declarations that the interest shall vest in such captors "after final adjudication," and not before.

The only difference between the rights of the Government and the captors as regards the captured property in England at the time of the decision just quoted, and in the United States under the Revised Statutes, is practically this—that if, where no property can be sent in for adjudication (owing to appropriation by the Government or other statutory cause), and the Secretary of the Navy does not, within three months after the capture, designate a district for the institution of proceedings, the captors may institute proceedings for adjudication in any district, as has actually been done in the present case. (Rev. Stats., § 4625.) In no other particular has the Government's control of the property been changed from what Lord Stowell held it to be. This provision of section 4625 is merely a concession to the captors, to enable the question of prize or no prize to be judicially determined even in cases where the Government holds that the capture is not within the prize statutes. This concession was surely never intended to give the captors any greater rights than if the libel had been filed by the Government in their behalf.

In point of fact, the restitution having been made by treaty, by the law of the land, it is not necessary to rely on the doctrine laid down in *The Elsebe*, sound and reasonable as that doctrine is. It is enough to

point to the treaty as necessarily fixing the status of the particular property in question.

The original answer of the United States did not refer specifically to this restitution by treaty, but on December 19, 1900, an amendment to the answer was filed covering this point. It appears that a board of officers was appointed to confer with the Spanish board of liquidation. A report of the former board, found in Appendix N N to the reports of the War Department for 1900, makes mention, on page 206, of the supplies at Cavite which had not at that time been segregated. A recent report of the War Department on file in the present case shows that certain property has been segregated and turned over to the Spanish board.

If property captured on land were prize property within the prize statutes, it would be necessary to deduct the value of the property restored from that of the property proved to have been taken; but as, it is submitted, property on land is not prize, this matter of restitution, though interesting, really cuts no figure in the case.

In the court below the libellant's counsel contended, and the contention will probably be renewed, that as the restitution was made after an appropriation by the United States, it came too late; or, in other words, that because the United States kept the property in its own control, so that it was in a position to restore it, therefore it could not restore it without making compensation to the would-be captors. This conclusion is rather extraordinary. Had the United States

conceded that the property was prize of war, and filed a libel against it for the benefit of the captors, then, under the doctrine of *The Elsebe*, it could have restored it, without liability to the captors, at any time before adjudication, as the brief for libelant practically concedes. How then can the fact that the United States never recognized any rights of the captors in this property, and has not filed any libel against it for their benefit, but has opposed the libel filed by them, make it liable to them for property restored before adjudication? The libellant's contention on this point confuses two kinds of appropriation. Under section 4624 of the Revised Statutes the United States has a right to appropriate prize property, and is responsible to the captors for their share of its value, but apart from that section the United States has also the right, as sovereign, to appropriate all property taken in war, other than prize property, without responsibility to anyone. In the present case the appropriation of all the property taken on land was made in reliance upon the latter power, and was never intended to be made under section 4624. Hence the appropriation made was not the kind of appropriation to which the libelant's brief refers. Yet even if it had been an appropriation under section 4624, such appropriation, it is submitted, could not have divested the United States of its sovereign right to restore before adjudication, without liability to the captors.

This contention of the libelant's counsel is strikingly at variance with their contention as to vessels

"sunk or otherwise destroyed." They contend, practically, that while the fact that a vessel is sunk or otherwise destroyed gives rise to a right of bounty if the United States leaves such vessel alone, yet if the United States, months afterwards, raises and reconstructs such a vessel, it must be treated as a prize—i. e., it must change its status. If, however, the United States appropriates captured property, that fact, they contend, permanently fixes its status as prize, so that it can never lose that status, even by restitution before adjudication.

For reasons already stated, both of these contentions are, it is submitted, wrong; but setting those reasons aside and looking at the matter from the standpoint of libelant's counsel, their contention for a changeable status in the one case and a permanent one in the other are still in conflict.

2.

STATUS OF CASCOS AND OTHER NONSEAGOING CRAFT.

The libel as originally filed related exclusively to vessels and other property taken from the King of Spain, but it was amended on April 25, 1901, so as to cover certain cascos or small native boats, and also to two wrecking boats, the property of private citizens residing in the Philippine Islands. The court below held that these small craft were not of such a character as to be within the scope of the prize statutes.

As stated by the court below, "the testimony as to capture, description, value, use, and appropriation of these craft is very meager and unsatisfactory." (Rec.,

159.) The idea of attempting to assert prize rights in regard to them was evidently an afterthought, which did not suggest itself until some time after the libel was filed.

A casco has been described by one of the witnesses as follows: "It is a large barge, rather larger than the ordinary canal boat; it has one deep, commodious hold in which the cargo is carried, and over the top has a thatched bamboo covering made in sections cut athwartships, which slide past one another." Their tonnage capacity was sufficient to carry about 140 tons of coal each. They were propelled by sweeps and by poling. They were not provided with ship's papers, and it would have been impossible to put a prize crew aboard them and send them to the nearest neutral port," for the very evident reason that they would, in all probability, have been lost on the way. They were all, as far as this record shows, private property, and most, if not all of them, were owned by native Filipinos. (Rec., 23, 24.)

Another witness states in regard to some of the cascos: "These cascos were cargo boats used in discharging cargoes of ships anchored in the bay. They varied

---

[a] The opinion of the court below states that these boats could not have been sent "to the nearest neutral port for adjudication." (Rec., 158.) The last two words were inadvertently used, as there can be no adjudication in a neutral port (*The Josefa Segunda*, 5 Wheat., 338, 358; *Hopner* v. *Appleby*, 5 Mas., 71, 75), though a prize brought into a neutral port in distress may be repaired there for further navigation (2 Opins. A. G., 86; 7 id., 123). Even the old rule that a court of the captor's country could condemn a prize when the latter was in a neutral port (*Hudson* v. *Guestier*, 4 Cr., 293) would seem to be in conflict with Revised Statutes, sec. 4615, which require the prize, if in condition to be sent in at all, to be sent to the port where adjudication is to be had.

in capacity from 30 to 60 tons, and their value, as a matter of positive fact, varied from $1,500 to $1,800, Mexican, apiece. I happen to know this, because subsequently I was on board to appraise the value of these cascos and I saw the bill of sale of nearly all of them." (Rec., 69.)

Besides these cascos, two floating derricks or wrecking boats were taken. It appears from the evidence that "they were flatboats. The large one was about 40 feet long and 15 feet broad, and it was capable of lifting a weight of about 7 tons. It could weigh more than that, but the derrick could lift that much." These boats had no means of propulsion, were not seagoing boats in any sense, but just for use around the harbor, and could only be used in comparatively smooth water. They could stand harbor seas, but "were not boats such as were provided for any of the ordinary ship's purposes." It would have been impossible to have put a prize crew on them and send them to the nearest neutral port. (Rec., 69, 70.) There is no evidence whatever as to the ownership of these wrecking boats; but from the fact that they are mentioned by the witness Hodges almost in the same breath with the cascos which belonged mostly, if not all, to native Filipinos, it is to be inferred that they also were the private property of Filipinos. They may have been the property of neutrals, and in any event it must be *proved* that they were enemy property before they can be held to have been good prize.

These cascos and flatboats are clearly not within the contemplation of the prize statutes, as indicated par-

ticularly by the provisions of sections 4615, 4617, and 4618 of the Revised Statutes. As already stated in another connection, section 4615 begins with the words, "The commanding officer of any vessel making a capture shall secure the documents of the ship and cargo, including the log book, with all other documents, letters, and other papers found on board. * * * He shall send the prize, with the documents, papers, and witnesses, under charge of a competent prize master and prize crew, into port for adjudication." Here it is evident that the word capture is practically defined as a "ship and cargo," and further, that a ship is defined as a vessel provided or entitled to be provided with the usual ship's documents and capable of being sent into port for adjudication under charge of a prize master and prize crew. Unless a captured vessel is of this character it can not be a prize within the contemplation of section 4615.

An open boat or other small nonseagoing craft, such as are always carried on large vessels, would of course be a prize as a part of the outfit of the vessel on which it was found when taken; but while it may be proper for a naval force to seize independent small boats (not a part of the outfit of a prize) for its own use or to keep them from being used by the enemy, there is no statutory authority for treating such vessels as prize. Even if the absence of the usual ship's papers could be overlooked, the fact that these cascos and flatboats could not have been put in charge of a prize crew and sent even to the nearest neutral port (to say nothing of

an American port, where alone could the question of their status as prizes have been tried) shows that they are not the kind of property which could be made a prize under our statutes. As already shown in another connection, these statutes are to be strictly construed, and grant nothing to the captors but what is necessarily covered by their terms.

While there seems to be no real ground to doubt that the prize statutes were never intended to apply to small craft like these cascos and flatboats, it may be interesting to notice some decisions in analogous cases under other statutes.

In *Ex parte Ferguson* (L. R., 6 Q. B., 280, 291) a ship is practically defined as "a seagoing vessel." The case arose under a statute providing that the word "ship" should include every description of vessel used in navigation not propelled by oars. These words were held to give the term "ship" a more extensive meaning than it ordinarily had, and in view of this more extensive meaning Blackburn, J., said:

> What, then, is the meaning of the word "ship" in this act? It is this: That every vessel that substantially goes to sea is a "ship." I do not mean to say that a little boat going out for a mile or two to sea would be a ship, but where it is its business really and substantially to go to sea, if not propelled by oars, it shall be considered a ship for the purpose of this act.

United States v. *An Open Boat and Lading* (5 Mas., 120; 27 Fed. Cas., 346) involved the definition of the word "vessel" as used in the nonintercourse acts of

May 15, 1820, and March 1, 1823 (3 Stats., 602, 740). Story, J., said:

> The boat itself is less than five tons in burthen, and is open and without any deck. * * * At the time of the seizure the boat had on board 28 barrels of tar and pitch. * * *
>
> I am not aware that in any of our laws respecting shipping the word "vessel" is applied to any description of boats like the present. The registry act (act of 1792, ch. 45) invariably uses the words "ship or vessel" as descriptive of the class of shipping which it includes. It contains no limitation by tonnage of the size of the ship or vessel, but the form of the certificate of registry (§ 9) supposes that such ship or vessel has a deck, mast, etc. And the regulations prescribed by our laws for ascertaining the tonnage of ships or vessels for the payment of tonnage duty and for other purposes of admeasurement, refer to such only as have one or more decks. (Act of 1799, ch. 128, § 64.) The fair inference deducible from these provisions is that the registry act was not meant to apply to ships or vessels without any deck. In respect to the coasting trade and fisheries, the same phrase, "ship or vessel," is used in the act of 1793, ch. 52, for enrolling or licensing them for such business, but no ship or vessel less than five tons in burthen seems within the purview of this act (§§ 1, 4, 26). The form of enrollment, too, presupposes that the ship or vessel has a deck, mast, etc., and her tonnage is to be ascertained in the same manner as in the case of registered ships. There is a provision also (§ 3)

that registered ships may be enrolled, and enrolled or licensed ships may be registered, which seems by implication to limit their sizes reciprocally to tonnage above five tons and to such as have a deck or mast. This construction is fortified by the language of the thirty-seventh section, which declares "that nothing in this act shall be construed to extend to any *boat* or lighter not being masted, or if masted and not decked, employed in the harbor of any town or city." It is plain from this clause that boats without masts or decks were not allowed to be enrolled or licensed for the coasting trade or fisheries. And the fishing bounty is confined to "boats or vessels" of more than five tons burthen. (See act of 1813, ch. 34, §§ 5, 6.)

There are also provisions in our laws which contemplate importations from foreign countries in vessels of a smaller description. But in such cases the general term "vessel" is not alone employed, but a more specific description is added. Thus, by the one hundred and fifth section of the act of 1799, ch. 128, importations are allowed on the northern and northwestern boundaries of the United States "in vessels or *boats* of any burthen;" and the next section (§ 106) goes on to provide "that all vessels, *boats*, rafts, and carriages of what kind or nature soever, arriving in the district aforesaid, containing goods, etc., shall be reported to the collector," etc. A distinction between *boats* and *vessels* is here taken; and a distinction does, in fact, exist in common parlance and maritime usage. The term "*vessel*" is never, or at least

very rarely, used to designate any water craft without a deck; but the term "*boat*" is constantly used to designate such small vehicles of this nature as are without a deck. In *Mortimer's Commercial Dictionary* a *boat* is defined to be "a small *open* vessel, commonly wrought by oars." He says that the term "ship" is a "general name for all large vessels." And it appears to me that the general sense in which the word "*vessel*" is used in our laws is in contradistinction to an *open boat*, and excluding the latter. Such is its meaning in the act of 1815, ch. 246, where it is declared lawful "for any collector, etc., to enter on board, search, and examine any *ship*, *vessel*, *boat*, or *raft*," etc. (See, also, act of 1802, ch. 45, sec. 8.) And when the word is found in our laws without anything in the context to explain or enlarge its meaning, it appears to me a sound rule of interpretation to construe it as used in that sense, which is its most common sense in maritime usage. Especially ought it to receive such an interpretation when it interferes with no known policy of the legislature, and a different course would involve general inconvenience.

In *Birkbeck* v. *The Hoboken Horse Ferry Boats* (17 Johns., N. Y., 54) it was held that ferryboats worked by horses, plying between New York and Hoboken, did not come within the term "ships or vessels of all descriptions," in a statute, in view of other language in the same statute restricting its operation to vessels which pass from one port to another port. This decision was followed in *Farmer's Delight* v. *Lawrence* (5

Wend., N. Y., 564), and *Many* v. *Noyes* (5 Hill, N. Y., 34). In the former case the court said:

> It never could have been the intention of the legislature to embrace within these acts the innumerable rowboats, sailboats, scows, and other small craft which crowd our harbors; they are not within the reason of the law nor within its terms as they are ordinarily used. They are not designated as ships or vessels in common parlance; *those terms are usually applied to vessels of a larger class.*

In *Hicks* v. *Williams* (17 Barb., N. Y., 523) a canal boat was held not to be "a vessel of the United States," within the meaning of the act of July 29, 1850 (9 Stats., 440).

A rowboat is not a "vessel" within the meaning of rule 21, § 4233 of the Revised Statutes, requiring steam vessels to keep out of the way of other vessels. (*Phila. and Reading R. R. Co.* v. *Adams*, 89 Pa., 31; *Fischer* v. *Camden, etc., Ferry Co.*, 124 id., 154.) In the latter case the court said: "When we speak of a rowboat we do not mean a vessel as that term is generally understood."

A floating dry dock is not the subject of salvage, not being a ship or vessel in the ordinary sense. (*Cope* v. *Vallette Dry Dock Co.*, 119 U. S., 625.)

Applying the general doctrine of these cases to the present one, it is manifest that these cascos and flatboats can not be within the operations of the prize statutes, which apply to seagoing vessels, provided with the ordinary ships' papers.

Even if section 4615 had not made it sufficiently clear that small nonseagoing boats were not the subject of capture as prize, it is submitted that to hold that they could be so captured would be totally at variance with the whole spirit and meaning of the opinion of this court in *The Paquete Habana* (175 U. S., 677), cited by the court below. The vessels under consideration in that case were seagoing, or at all events coasting, vessels of 25 and 35 tons burden, respectively, but were held not to be prize because they were fishing smacks. The underlying note of the entire opinion is that to make capture of the vessels of coast fishermen, peaceably pursuing their calling, would be derogatory to the civilization and humanity of a nation like the United States. Precisely "the same humane considerations," to quote the well-chosen words of the court below, apply to these cascos and flatboats. They were not vessels of war, nor could they be used for any offensive purposes directly. They might conceivably have been used for carrying the troops or supplies of the enemy about the harbor, but the same was true of the fishing vessels, which were held exempt from capture in *The Paquete Habana.* As a matter of fact, these small craft were not in use in any warlike way at the time they were taken. The cascos appear to have been in the possession of the native crews, who lived in the deck houses (Rec., 24), while the flatboats were presumably tied up to some wharf. In this connection another consideration should be noted which makes the libellant's position as regards these small

craft peculiarly weak. These small craft were not the property of the people with whom the United States was at war, but apparently of native Filipinos who, while claimed by Spain as its subjects, were not really on the Spanish side in the war. As soon as the present libellant's force was able to land and establish itself on shore it entered into friendly relations with the Filipinos, and provided many of them with arms for offensive and defensive operations against the Spaniards. To treat some of the Filipinos as friends and allies, and to treat others of them as enemies merely because they happened to be in the possession of small craft which might be of use to the United States, was certainly not a consistent course of action and should not be upheld by a court. What ultimately became of these cascos and flatboats does not appear from the record. It is to be presumed that they were needed for the legitimate use of the libellant's naval force, and this being so he had a right to take them just as he would have had a right to take any other private property; but the rules of humanity and of civilized warfare require that in such a case the owners should be paid their value if kept permanently, or paid a reasonable rental in case they were ultimately restored. Whether the rights of the Filipino owners of these little craft were ever recognized or not does not appear, but it is to be hoped that this was eventually done. If restitution was made, then these boats are not within the jurisdiction of the court, and in any event it is submitted that this court should not, by treating these boats as prize of war, put the seal of its

approval upon the spoliation of the poor Filipino natives who were their owners. It was sufficiently inconsistent with civilization that merchant vessels and the private property of Spanish citizens should have been prize of war upon the high seas during the recent hostilities, and every dictate of humanity must operate to deter a court from stretching the language of the prize law so as to make it applicable to such little craft as these cascos and flatboats.

In connection with this matter of small craft, it is to be observed that the property taken at the Cavite Arsenal included a certain number of small boats and launches. There was, for instance, a water boat, which was a part of the equipment of the arsenal, used to carry water from the shore to the various ships in the harbor. There were also certain gigs, whaleboats, and a wherry, as well as other small craft. (Rec., 6, 7.) These small craft were clearly not themselves of a nature to be taken as maritime prize. Had they belonged to any vessel which was captured as a prize, they would have been included in the prize property as a part of the outfit of the vessel, but, as a matter of fact, as the court below held, they either constituted a part of the equipment of the arsenal or were a part of the supplies stored there for future use, and hence can not be distinguished from the other property taken at the arsenal, which property, as already shown above, was not maritime prize.

In accordance with this view the decree stated that "all nonseagoing boats or craft afloat pertaining to

the said arsenal [were] not subject to condemnation in prize" (Rec., 160), and it is submitted that this portion of the decree should be upheld, as well as all that relates to the property taken at the arsenal.

There were also a number of other small craft which were a part of the outfit of the Spanish vessels which were sunk or destroyed in the engagement. The Spanish crews had escaped to the shore in these boats, and had abandoned them when they landed. As already stated above, these small boats can not be subject to condemnation in prize as "vessels," and hence their status must be precisely the same as that of the other property which formed part of the outfit of the sunken or destroyed vessels. If the decree of the court be reversed as to that property (as it is submitted should be done), then these small craft also should be held to be outside the operation of the prize statutes.

THE RELATIVE FORCE OF THE LIBELLANT'S FLEET AND OF THE ENEMY.

As it is conceded on the part of the United States that the *Manila* and certain smaller vessels were captured as prize of war, the question of relative force becomes relevant. Section 4630 of the Revised Statutes provides:

> The net proceeds of all property condemned as prize shall, when the prize was of superior or equal force to the vessel or vessels making the capture, be decreed to the captors; and when of inferior force, one-half shall be decreed to the United States and the other half to the captors.

The third section of the libel alleges that "the enemy's vessels engaged in said action, supported by torpedoes and mines and land batteries, as aforesaid, were of superior force to the vessels of the United States." It is submitted that the language of section 4630 is fully as clear as that of section 4635, to the effect that the "force" referred to is a naval force only.

In section 4635 the words are "if the enemy's vessel was of inferior force," and the words of section 4630 are "when the prize was of superior or equal force." The words "the prize" must be understood with reference to section 4615, as a "ship and cargo;" and even if it could possibly be held that property taken on land could be maritime prize, this would have no effect on the construction of section 4630, for the property in the Cavite Arsenal was in no sense a part of the force with which the libelant's fleet had to contend. It having been conclusively decided in *Dewey* v. *The United States* (178 U. S., 510) that the Spanish force engaged at Manila was inferior to that of the libelant, the court below decreed "that the prize aforesaid, being the vessels and other property captured afloat, was of inferior force to the vessels making the capture." (Rec., 160.) This feature of the decree should, it is submitted, be upheld.

It is therefore submitted that as to the *Don Juan de Austria*, the *Isla de Cuba*, and the *Isla de Luzon*, and as to all property taken from these vessels or other vessels which were sunk or otherwise destroyed at the battle of Manila Bay, and all small craft which were

part of the outfit of any of the said vessels, the decree should be reversed and set aside, and that in all other respects (apart from the questions raised exclusively by the appeal of Edwin F. Stovell, in which the United States is not interested on either side) it should be affirmed.

CHARLES C. BINNEY,
Special Attorney.

HENRY M. HOYT,
Assistant Attorney-General.

O